

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Pablo Ramon Guerrero,

Petitioner

V.

Brian E. Williams, et al.,

Respondents

Case No. 2:13-cv-00328-JAD-DJA

Order Denying Petition for Habeas Relief and Closing Case

[ECF Nos. 26, 120]

Petitioner Pablo Ramon Guerrero was found guilty of burglary, preventing or dissuading a victim from reporting a crime, sexual assault, conspiracy to commit burglary, two counts of burglary while in possession of a firearm, conspiracy to commit kidnapping, first-degree kidnapping while using a deadly weapon, first-degree kidnapping while using a deadly weapon resulting in substantial bodily harm, conspiracy to commit murder, attempted murder while using a deadly weapon resulting in substantial bodily harm, conspiracy to commit robbery with use of a deadly weapon, robbery with use a deadly weapon, and grand larceny in Nevada State Court and sentenced to a total of 30 years to life.¹ In a twenty-two count petition, Guerrero seeks a writ of habeas corpus under 28 U.S.C. § 2254 based on claims that his trial counsel was ineffective.² I now address these claims on their merits. I find that habeas relief is not warranted, so I deny Guerrero's petition, deny him a certificate of appealability, and close this case.

¹ ECF Nos. 37-10, 39-3, 41-4.

² ECF No. 26.

1 **Background**

2 **A. The facts underlying Guerrero's conviction³**

3 Guerrero and his wife, Brenda Gallardo, separated in May 2001, and Brenda took their
4 two children, four-year-old Pablito and ten-month-old Anthony, to live with her parents and
5 sisters, the Gallardos. On November 6, 2001, Guerrero called Brenda at 1:30 a.m., asking
6 whether Brenda was talking to other men. Brenda denied the accusations, and around 9:00 a.m.,
7 Guerrero showed up at the Gallardo residence, where Brenda, Pablito, and Anthony were alone.

8 Guerrero confronted Brenda with her cell phone bill and asked her who she had been
9 calling. When Brenda denied that she had been speaking to other men, Guerrero punched her in
10 the face, causing her to fall to the floor in front of Pablito. Brenda asked Guerrero to leave, and
11 when he refused, she ran to the kitchen to call the police. Guerrero grabbed the telephone from
12 Brenda and removed the batteries.

13 Following this altercation, Guerrero's friend and codefendant, Eriberto Leon, arrived at
14 the residence wearing black gloves. While Leon entertained Pablito, Guerrero told Brenda that
15 he would leave if she had sexual intercourse with him. Brenda agreed. Following the sexual
16 encounter, Brenda asked Guerrero to leave, but Guerrero indicated that he lied before about
17 leaving. Brenda ran to the front door, but Guerrero tackled her.

18 Guerrero had originally told Brenda that he was going to take her and the kids to Mexico,
19 but after Brenda insisted that the children were too young, Guerrero agreed to pick up Brenda's
20 sister Sonia Gallardo from high school to babysit the children. Guerrero bound Brenda's feet
21 and hands, covered her mouth with duct tape, and put her in her parents' van. Guerrero, who had
22

23 ³ These facts are taken from Brenda Gallardo's, Sonia Gallardo's, and Guerrero's testimony at
Guerrero's trial. ECF Nos. 36-9, 36-10, 37-2, 37-3. For simplicity's sake, I cite to these exhibits
generally for this entire background section.

1 a gun on his lap, and Brenda then drove to Sonia's school, picked Sonia up, and drove back to
2 the residence. During the drive back to the residence and while the vehicle was parked in the
3 garage, Sonia tried to persuade Guerrero that Brenda still loved him. Guerrero responded that he
4 was going to take Brenda to Tijuana, Mexico, where she was going to learn how to love him
5 again.

6 Guerrero demanded that Sonia retrieve Brenda's cellular telephone. Leon, who had been
7 watching the children, escorted Sonia into the residence to retrieve the phone. Leon gave the cell
8 phone to Guerrero, and Brenda told Sonia to go inside and lock the doors. Guerrero gave Leon
9 some instructions, including to meet him at a casino in Primm, Nevada, in about an hour, and he
10 left in the van with Brenda. Leon then entered the locked residence, ordered Sonia upstairs,
11 forced her to the ground, covered her face with a baby blanket, and shot her in the head. Sonia
12 survived and, after learning that the telephone cords had been cut, jumped off a balcony and went
13 to a neighbor's residence to ask for help.

14 Meanwhile, Guerrero drove to the desired meeting place in Primm, Nevada, but when
15 Leon failed to arrive, Guerrero started driving into California. During the drive, Brenda spoke to
16 her mother; Guerrero's sister, Maricela Guerrero; and a detective on her cell phone and learned
17 that Sonia had been shot. Law enforcement eventually started following the van, and Guerrero
18 told Brenda that he was going to shoot them both when he stopped. On the detective's
19 recommendation, Brenda turned off the van's ignition while it was still moving, and while
20 Guerrero was turning it back on, Brenda grabbed the gun on his lap, ran to the back of the van,
21 and threw it out the window. When the van became disabled by roadway spikes, Guerrero pulled
22 the vehicle over and was arrested.

1 After Brenda and Sonia testified to these events at trial, Guerrero testified. He stated that
2 he purchased a gun for protection after his condominium was burglarized and purchased rope
3 and tape from Wal-Mart at 4:00 a.m. on November 6, 2001, for his landscaping job. Guerrero
4 said that he had Leon drop him off at the Gallardo residence on the morning of November 6,
5 2001, so that he could speak with Brenda, and he asked Leon to pick him back up in two hours.
6 He claimed that, after Guerrero questioned Brenda about her telephone bill, Brenda started
7 screaming and Guerrero hit her. Guerrero claimed that he did not leave when Brenda asked him
8 to “because [he] knew that if [he] left, that she was going to just try to make up a lie to cover
9 whatever up.”

10 After Leon arrived at the residence, Guerrero suggested that he entertain Pablito while
11 Guerrero and Brenda talked. It was at this point that Guerrero suggested that they take a trip to
12 California with the children. Brenda rejected Guerrero’s suggestion and told him to leave, but
13 Guerrero knew that “if [he] went home, that she was going to make up something, a lie and
14 everything.” Guerrero then explained that Brenda initiated sexual intercourse so that he would
15 leave. Guerrero was hesitant but accepted the offer because he felt guilty for hitting her earlier in
16 the morning.

17 After the sexual encounter, Guerrero told Brenda to pack up some of her clothes so that
18 they could go to California, but she refused, so Guerrero “grabbed the clothes from her closet
19 [him]self and [he] put them on the bed.” Guerrero asked for Brenda’s cellular telephone, but she
20 refused and “tried to run to the door.” Guerrero “tried to close the door in front of her . . . and
21 she fell to the ground.” Guerrero and Brenda then agreed to go to California without the children
22 and to pick Sonia up from school so that she could babysit. While Guerrero and Brenda were in
23 her parents’ van in the garage prior to leaving to pick up Sonia, Guerrero asked Leon to bring

1 him the bag of Wal-Mart supplies, the gun, and a big knife. “Since [Brenda] wouldn’t shut up, . .
2 . [Guerrero] put tape on her mouth and . . . tied her ankles together.”

3 After arriving back at the residence with Sonia and getting Brenda’s cellular telephone
4 and her clothing, Guerrero and Brenda left in the van. Guerrero saw Leon get into Guerrero’s
5 vehicle and leave at the same time so that they could meet at the preselected casino. But when
6 Leon did not arrive at the location in Primm, Nevada, Guerrero started driving to California,
7 which was when Maricela told them by telephone that Sonia had been shot. Guerrero testified
8 that he did not stop the van even though law enforcement was following him “[b]ecause [he] was
9 paranoid because [he] didn’t know what [he] was going to do.” Guerrero claimed that Brenda
10 threw the gun out of the window so that he would not get into trouble.

11 **B. Procedural history**

12 Following a jury trial, Guerrero’s judgment of conviction was entered on March 31,
13 2004.⁴ Guerrero appealed, and the Nevada Supreme Court affirmed in part, reversed in part, and
14 remanded the matter to the state district court.⁵ The Nevada Supreme Court reversed Guerrero’s
15 conviction for conspiracy to commit robbery because the state district court erroneously used the
16 deadly-weapon enhancement.⁶ The state district court entered an amended judgment of
17 conviction pursuant to the Nevada Supreme Court’s order on August 15, 2005.⁷

18
19
20
21 _____
22 ⁴ ECF No. 39-3.

23 ⁵ ECF No. 11-4.

⁶ *Id.* at 15–16.

⁷ ECF No. 41-4.

1 Guerrero filed a proper person state habeas petition on June 6, 2006.⁸ The state district
2 court appointed counsel, who filed a supplemental petition on April 12, 2007.⁹ After an
3 evidentiary hearing, the state district court denied the petition on November 23, 2011.¹⁰ The
4 Nevada Supreme Court affirmed the denial of the petition on January 16, 2013.¹¹ Remittitur
5 issued on February 12, 2013.¹²

6 Guerrero's federal habeas petition was filed on April 1, 2013.¹³ Guerrero filed a
7 counseled, first amended petition on May 17, 2013, and a counseled, second amended petition on
8 December 16, 2013.¹⁴ The respondents moved to dismiss Guerrero's second amended petition
9 on May 22, 2014.¹⁵ On May 19, 2015, I granted the motion, in part, finding that Grounds 1–10,
10 12–14, and 16–22 were unexhausted and that only a portion of Ground 15 was exhausted; and I
11 stayed this action pending final resolution of Guerrero's state post-conviction proceedings.¹⁶

18 ⁸ ECF No. 42.

19 ⁹ ECF No. 27-9.

20 ¹⁰ ECF No. 27-17.

21 ¹¹ ECF No. 27-20.

22 ¹² ECF No. 27-21.

23 ¹³ ECF No. 6.

¹⁴ ECF Nos. 9, 26.

¹⁵ ECF No. 64.

¹⁶ ECF No. 78 at 8.

1 Guerrero filed a counseled, second state habeas petition on September 8, 2015.¹⁷ The
2 state district court dismissed that petition on January 26, 2016.¹⁸ The Nevada Supreme Court
3 affirmed the dismissal on June 15, 2017,¹⁹ and remittitur issued on July 13, 2017.²⁰

4 Guerrero moved to reopen his federal habeas case on July 20, 2017.²¹ I granted the
5 motion and lifted the stay on August 3, 2017.²² The respondents again moved to dismiss
6 Guerrero's second amended petition on December 18, 2017.²³ On August 23, 2018, I granted
7 the motion, in part, finding that Grounds 12, 17, and 22 were dismissed as noncognizable;
8 Grounds 1, 2, 3, 13, 14, 18, and 21 were dismissed as procedurally barred; all claims in Grounds
9 15 and 16 were dismissed as procedurally barred except the ineffective-assistance-of-counsel
10 claims; decisions on Grounds 4-10, 19, 20, and the trial-ineffective-assistance-of-counsel claims
11 in Grounds 15 and 16 were deferred; and Ground 4(1) was unexhausted.²⁴ Guerrero voluntarily
12 abandoned Ground 4(1).²⁵ The respondents answered the remaining grounds in Guerrero's
13 second amended petition on March 15, 2019,²⁶ and Guerrero replied on July 29, 2019.²⁷

14 In Guerrero's remaining grounds for relief, he alleges the following instances of
15 ineffective assistance of counsel in violation of his federal constitutional rights:

16 ¹⁷ ECF No. 88-5.

17 ¹⁸ ECF No. 88-12.

18 ¹⁹ ECF No. 88-25.

19 ²⁰ ECF No. 88-26.

20 ²¹ ECF No. 79.

21 ²² ECF No. 82.

22 ²³ ECF No. 87.

23 ²⁴ ECF No. 98 at 12–13.

²⁵ ECF No. 103.

²⁶ ECF No. 109.

²⁷ ECF No. 117.

- 1 4. His trial counsel failed to conduct a complete investigation.
- 2 5. His trial counsel failed to move to sever his trial from his co-defendant's
- 3 trial.
- 4 6. His trial counsel failed to inform the state district court that he was going to
- 5 testify to avoid any *Bruton* issues and to allow him to present exculpatory
- 6 evidence.
- 7 7. His trial counsel failed to adequately prepare for trial.
- 8 8. His trial counsel failed to properly prepare him to testify at trial and failed
- 9 to competently present his side of the story through his testimony.
- 10 9. His trial counsel failed to object at critical moments during trial.
- 11 10. His trial counsel failed to object to erroneous jury instructions that shifted
- 12 the burden of proof or lessened the State's burden of proof as to each
- 13 element of the crimes charged beyond a reasonable doubt.
- 14 11. His trial counsel failed to request a jury instruction on his theory of defense
- 15 regarding the sexual assault charges.
- 16 15. His trial counsel failed to object to improper jury instructions, failed to join
- 17 in on a proffered instruction offered by the co-defendant, and failed to
- 18 proffer an instruction on Guerrero's theory of defense on the sexual assault
- 19 charge.
- 20 16. His trial counsel failed to object to Leon's trial counsel's closing argument
- 21 and cross-examination of him.
- 22 19. His trial counsel unreasonably put him on the stand without adequate
- 23 preparation and pursued an unreasonable theory of defense and argument.
- 24 20. His trial counsel failed to challenge Leon's theory of defense and failed to
- 25 investigate allegations that Leon was a gang-member.²⁸

26 On October 22, 2019, Guerrero requested that I take judicial notice of his underlying state
27 appeal-court filings.²⁹ The respondents moved to strike Guerrero's request.³⁰

28 ECF No. 26 at 21–147.

29 ECF No. 119.

30 ECF No. 120.

1 **Discussion**

2 **A. Legal standards**

3 **1. Review under the Antiterrorism and Effective Death Penalty Act (AEDPA)**

4 If a state court has adjudicated a habeas corpus claim on its merits, a federal district court
5 may only grant habeas relief with respect to that claim if the state court’s adjudication “resulted
6 in a decision that was contrary to, or involved an unreasonable application of, clearly established
7 Federal law, as determined by the Supreme Court of the United States” or “resulted in a decision
8 that was based on an unreasonable determination of the facts in light of the evidence presented in
9 the State court proceeding.”³¹ A state court acts contrary to clearly established federal law if it
10 applies a rule contradicting the relevant holdings or reaches a different conclusion on materially
11 indistinguishable facts.³² And a state court unreasonably applies clearly established federal law
12 if it engages in an objectively unreasonable application of the correct governing legal rule to the
13 facts at hand.³³ Section 2254 does not, however, “require state courts to *extend*” Supreme Court
14 precedent “to a new context where it should apply” or “license federal courts to treat the failure
15 to do so as error.”³⁴ The “objectively unreasonable” standard is difficult to satisfy;³⁵ “even
16 ‘clear error’ will not suffice.”³⁶

17
18
19 ³¹ 28 U.S.C. § 2254(d).

20 ³² *Price v. Vincent*, 538 U.S. 634, 640 (2003).

21 ³³ *White v. Woodall*, 134 S. Ct. 1697, 1705–07 (2014).

22 ³⁴ *White*, 134 S. Ct. 1705–06.

23 ³⁵ *Metrish v. Lancaster*, 569 U.S. 351, 357–58 (2013).

³⁶ *Wood v. McDonald*, 135 S. Ct. 1372, 1376 (2015) (per curiam) (citation omitted); *see also* *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (“The question . . . is not whether a federal court believes the state court’s determination was incorrect but whether that determination was unreasonable—a substantially higher threshold.”).

1 Habeas relief may only be granted if “there is no possibility [that] fairminded jurists
2 could disagree that the state court’s decision conflicts with [the Supreme Court’s] precedents.”³⁷
3 As “a condition for obtaining habeas relief,” a petitioner must show that the state-court decision
4 “was so lacking in justification that there was an error well understood and comprehended in
5 existing law beyond any possibility of fairminded disagreement.”³⁸ “[S]o long as ‘fairminded
6 jurists could disagree’ on the correctness of the state court’s decision,” habeas relief under
7 Section 2254(d) is precluded.³⁹ AEDPA “thus imposes a ‘highly deferential standard for
8 evaluating state-court ruling,’ . . . and ‘demands that state-court decisions be given the benefit of
9 the doubt.’”⁴⁰

10 If a federal district court finds that the state court committed an error under § 2254, the
11 district court must then review the claim de novo.⁴¹ The petitioner bears the burden of proving
12 by a preponderance of the evidence that he is entitled to habeas relief,⁴² but state-court factual
13 findings are presumed correct unless rebutted by clear and convincing evidence.⁴³

18 ³⁷ *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

19 ³⁸ *Id.* at 103.

20 ³⁹ *Id.* at 101.

21 ⁴⁰ *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citations omitted).

22 ⁴¹ *Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008) (en banc) (“[I]t is now clear both that we
may not grant habeas relief simply because of § 2254(d)(1) error and that, if there is such error,
we must decide the habeas petition by considering de novo the constitutional issues raised.”).

23 ⁴² *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

⁴³ 28 U.S.C. § 2254(e)(1).

1 **2. *Standard for evaluating an ineffective-assistance-of-counsel claim***

2 The right to counsel embodied in the Sixth Amendment provides “the right to the
3 effective assistance of counsel.”⁴⁴ Counsel can “deprive a defendant of the right to effective
4 assistance[] simply by failing to render ‘adequate legal assistance[.]’”⁴⁵ In the hallmark case of
5 *Strickland v. Washington*, the United States Supreme Court held that an ineffective-assistance
6 claim requires a petitioner to show that: (1) his counsel’s representation fell below an objective
7 standard of reasonableness under prevailing professional norms in light of all of the
8 circumstances of the particular case;⁴⁶ and (2) it is reasonably probable that, but for counsel’s
9 errors, the result of the proceeding would have been different.⁴⁷

10 A reasonable probability is “probability sufficient to undermine confidence in the
11 outcome.”⁴⁸ Any review of the attorney’s performance must be “highly deferential” and must
12 adopt counsel’s perspective at the time of the challenged conduct so as to avoid the distorting
13 effects of hindsight.⁴⁹ “The question is whether an attorney’s representation amounted to
14 incompetence under prevailing professional norms, not whether it deviated from best practice or
15 most common custom.”⁵⁰ The burden is on the petitioner to overcome the presumption that
16 counsel made sound trial-strategy decisions.⁵¹

18 ⁴⁴ *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397
19 U.S. 759, 771 n.14 (1970)).

20 ⁴⁵ *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 335–36 (1980)).

21 ⁴⁶ *Strickland*, 466 U.S. at 690.

22 ⁴⁷ *Id.* at 694.

23 ⁴⁸ *Williams v. Taylor*, 529 U.S. 362, 390–91 (2000).

⁴⁹ *Strickland*, 466 U.S. at 689.

⁵⁰ *Harrington*, 562 U.S. at 104.

⁵¹ *Id.*

1 The United States Supreme Court has described federal review of a state supreme court's
2 decision on an ineffective-assistance claim as "doubly deferential."⁵² So, I "take a 'highly
3 deferential' look at counsel's performance . . . through the 'deferential lens of § 2254(d).'"⁵³
4 And I consider only the record that was before the state court that adjudicated the claim on its
5 merits.⁵⁴

6 **B. Evaluating Guerrero's remaining claims**

7 I previously found that, except for a portion of Ground 15, Grounds 1–10 and 12–22 were
8 unexhausted.⁵⁵ I then granted Guerrero's stay and abeyance.⁵⁶ After Guerrero filed a second
9 state habeas petition and appealed the denial of that petition, the Nevada Supreme Court
10 determined that his second state habeas petition was untimely and successive and thus
11 procedurally barred.⁵⁷ Guerrero contends that the default should be excused under *Martinez v.*
12 *Ryan*⁵⁸ because he received ineffective assistance of post-conviction counsel.⁵⁹

13 To establish cause for a procedural default, the petitioner must "show that some objective
14 factor external to the defense impeded" his efforts to comply with the state procedural rule.⁶⁰ In

15 ⁵² *Cullen*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)).

16 ⁵³ *Id.*

17 ⁵⁴ *Id.* at 181–84.

18 ⁵⁵ ECF No. 78 at 5.

19 ⁵⁶ *Id.* at 8.

20 ⁵⁷ ECF No. 88-25 at 2.

21 ⁵⁸ *Martinez v. Ryan*, 566 U.S. 1 (2012).

22 ⁵⁹ See ECF No. 98 at 6 (citing ECF No. 95 at 5-10).

23 ⁶⁰ *Murray v. Carrier*, 477 U.S. 478, 488 (1986); see also *McCleskey v. Zant*, 499 U.S. 467, 497 (1991) ("For cause to exist, the external impediment . . . must have prevented [the] petitioner from raising the claim."); *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989) ("To establish prejudice resulting from a procedural default, a habeas petitioner bears 'the burden of showing not merely that the errors [complained of] constituted a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire [proceeding] with errors of

1 *Martinez*, the United States Supreme Court ruled that ineffective assistance of post-conviction
2 counsel may serve as cause to overcome the procedural default of a claim of ineffective
3 assistance of trial counsel.⁶¹ The Court noted that it had previously held in *Coleman v.*
4 *Thompson* that “an attorney’s negligence in a postconviction proceeding does not establish
5 cause” to excuse a procedural default.⁶² But the *Martinez* Court “qualif[ied] *Coleman* by
6 recognizing a narrow exception: [i]nadequate assistance of counsel at initial-review collateral
7 proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective
8 assistance at trial.”⁶³ The Court described “initial-review collateral proceedings” as “collateral
9 proceedings [that] provide the first occasion to raise a claim of ineffective assistance of trial.”⁶⁴

10 Because *Martinez* cannot save non-ineffective-assistance-of-trial-counsel claims, I
11 dismissed Grounds 1, 2, 3, 13, 18, 21, the trial-court-error claims in Grounds 15 and 16, and the
12 ineffective-assistance-of-appellate-counsel claims in Grounds 14, 15, and 16.⁶⁵ I also dismissed
13 Grounds 12, 17, and 22 as noncognizable and dismissed the remainder of Ground 14 as
14 duplicative.⁶⁶ With the exception of Ground 11, which is subject to disposition on the merits, the
15 underlying merits of the remaining Grounds—4, 5, 6, 7, 8, 9, 10, 15, 16, 19, and 20—are
16 intertwined with the *Martinez* analysis, so I deferred ruling on the *Martinez* issue until the merits

17
18
19 constitutional dimension.” (emphases in original), citing *United States v. Frady*, 456 U.S. 152,
170 (1982)).

20 ⁶¹ 566 U.S. at 9.

21 ⁶² *Id.* at 15 (citing *Coleman v. Thompson*, 501 U.S. 722 (1991)).

22 ⁶³ *Id.* at 9.

23 ⁶⁴ *Id.* at 8.

⁶⁵ ECF No. 98 at 7.

⁶⁶ *Id.* at 4, 8.

1 were briefed by the parties.⁶⁷ I now discuss these twelve claims in the order in which they were
2 made.

3 ***1. Ground 4***⁶⁸

4 In Ground 4, Guerrero argues that his trial counsel failed to conduct a complete
5 investigation.⁶⁹ He contends that trial counsel should have investigated the McDonald's
6 employees in Primm, Nevada, to determine whether they could have testified that Brenda did not
7 appear to be in distress when Guerrero went through the drive-through line to get food while he
8 waited for Leon; investigated the employees at a gas station in Baker, California, to determine
9 whether they could have testified that Brenda did not appear to be in distress while he was
10 pumping gasoline and that Guerrero was talking on the phone with the detective for
11 approximately 15 minutes; investigated the lack of a t-shirt found in the van, which would have
12 disputed Brenda's testimony that she vomited into a t-shirt while the van was in the McDonald's
13 drive-through line; investigated Brenda and Guerrero's mental health; investigated Guerrero's
14 coworkers to see if they could provide positive character testimony; and investigated Guerrero's
15 work records and time cards to show that he had approximately \$400.00 and, therefore, no need
16 to rob the Gallardo residence.⁷⁰

17 Defense counsel has a "duty to make reasonable investigations or to make a reasonable
18 decision that makes particular investigations unnecessary."⁷¹ And "[i]n any ineffectiveness case,
19 a particular decision not to investigate must be directly assessed for reasonableness in all the

21 ⁶⁷ *Id.* at 10.

22 ⁶⁸ It is noted that Guerrero voluntarily abandoned Ground 4(1). ECF No. 103.

23 ⁶⁹ ECF No. 26 at 21.

⁷⁰ *Id.* at 24–29.

⁷¹ *Strickland*, 466 U.S. at 691.

1 circumstances, applying a heavy measure of deference to counsel’s judgments.”⁷² This
2 investigatory duty includes investigating the defendant’s “most important defense,”⁷³ and
3 investigating and introducing evidence that demonstrates factual innocence or evidence that
4 raises sufficient doubt about the defendant’s innocence.⁷⁴ When the record demonstrates that
5 trial counsel was well-informed, and the defendant fails to provide what additional information
6 would have been gained by the investigation he now claims was necessary, an ineffective
7 assistance claim fails.⁷⁵

8
9 *a. McDonald’s and gas-station employee testimony refuting Brenda’s distress*

10 Brenda testified that she did not try to get the attention of anyone at McDonald’s because
11 Guerrero had “warned [her] that if [she] tried to get help, that to remember that [Leon] had [her]
12 oldest son with him.”⁷⁶ In fact, Guerrero showed Brenda that the Gallardo residence key was no
13 longer attached to the vehicle keys, indicating to Brenda that Leon had a key to the Gallardo
14 residence.⁷⁷ Similarly, Brenda testified that she did not try to get assistance during their stop in
15 Baker, California, because Guerrero “warned [her] not to try to get help.”⁷⁸ Because Brenda did
16 not attempt to signal that she was in distress at either the McDonald’s or the gas station, Guerrero
17 fails to show prejudice regarding his trial counsel’s alleged failure to investigate whether

18
19 _____
⁷² *Id.*

20 ⁷³ *Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994).

21 ⁷⁴ *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999).

22 ⁷⁵ *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986).

23 ⁷⁶ ECF No. 37-2 at 15–16.

⁷⁷ *Id.* at 15.

⁷⁸ *Id.* at 18.

1 employees at either of these locations could have testified that Brenda was not in distress.⁷⁹
2 Brenda also testified that Guerrero spoke to Sergeant Cervantes on the telephone.⁸⁰ Thus, further
3 testimony that Guerrero was speaking on the telephone while at the gas station was unnecessary
4 and would not have affected the outcome of Guerrero’s trial.⁸¹

5 *b. The t-shirt*

6 Brenda testified that she was “[o]n the floor in the back [of the van] throwing up in a t-
7 shirt” while the van was in the McDonald’s drive-through line.⁸² An investigation into the lack
8 of a t-shirt being found in the van may have impeached this portion of Brenda’s testimony.
9 However, it cannot be concluded that this relatively minor point would have affected the
10 outcome of Guerrero’s trial.⁸³

11 *c. Mental-health and character evidence*

12 Guerrero argues that an evaluation of Brenda would have shown that she had a tendency
13 to overdramatize certain things and that an evaluation of his mental health would have shown
14 that he would not have ordered his family members to be harmed and robbed.⁸⁴ Guerrero’s trial
15 counsel testified at the post-conviction evidentiary hearing that, although they “discussed that
16 [Brenda] had suicidal tendencies,” he did not remember a psychological exam of Brenda “being
17
18

19 ⁷⁹ *Strickland*, 466 U.S. at 694.

20 ⁸⁰ ECF No. 37-2 at 17.

21 ⁸¹ *Strickland*, 466 U.S. at 694.

22 ⁸² ECF No. 37-2 at 16.

23 ⁸³ *Strickland*, 466 U.S. at 694; *see also Doe v. Ayers*, 782 F.3d 425, 431 (9th Cir. 2015) (concluding that any “failures regarding impeachment of [the witness] are of comparatively little consequence”).

⁸⁴ ECF No. 26 at 28.

1 an issue that was ever raised between” himself and Guerrero.⁸⁵ Although trial counsel was
2 aware that Brenda may have had some mental-health issues, Guerrero fails to meet his burden of
3 demonstrating that the result of his trial would have been different had his trial counsel requested
4 such evaluations of Brenda or himself. Indeed, it is bald speculation that these evaluations
5 would have been favorable to Guerrero and would have impeached Brenda’s testimony and
6 explained his state of mind.⁸⁶

7 Likewise, it is pure speculation that Guerrero’s coworkers would have potentially offered
8 positive character testimony or that any such character evidence—or evidence showing that
9 Guerrero had approximately \$400.00—would have affected the outcome of Guerrero’s trial.⁸⁷
10 Evidence “plac[ing] Guerrero in a much better light before the jury”⁸⁸ would not change the fact
11 that Guerrero admitted to his participation in many of the events that took place on November 6,
12 2001.

13 Because Guerrero has not shown prejudice, Ground 4 is not substantial and Guerrero has
14 not demonstrated that his post-conviction counsel was ineffective. And because Guerrero’s post-
15 conviction counsel was not ineffective, there is no cause for Guerrero’s procedural default.⁸⁹
16 Ground 4 is denied as procedurally defaulted.

20 ⁸⁵ ECF No. 48-8 at 34.

21 ⁸⁶ See *Djerf v. Ryan*, 931 F.3d 870, 881 (9th Cir. 2019) (“[P]rejudice is not established by mere
22 speculation.”).

23 ⁸⁷ *Strickland*, 466 U.S. at 694.

⁸⁸ ECF No. 26 at 29.

⁸⁹ See *Martinez*, 566 U.S. at 9.

1 **2. Grounds 5 and 6**

2 In Ground 5, Guerrero argues that his trial counsel should have moved to sever his trial
3 from Leon’s trial.⁹⁰ Guerrero elaborates that, because the cases were not severed, he was
4 prevented from presenting evidence inculcating Leon due to Leon’s *Bruton* objections.⁹¹
5 Guerrero explains that if the trials had been separated, he would have been able to present
6 evidence that he did not know that Leon robbed the Gallardo residence or intended to shoot
7 Sonia and would not have been harshly cross-examined by Leon’s trial counsel.⁹² Similarly, in
8 Ground 6, Guerrero asserts that his trial counsel failed to inform the state district court before the
9 trial started that Guerrero was going to testify in order to avoid any *Bruton* issues.⁹³

10 In *Bruton v. United States*, the Supreme Court held that the admission at trial of a non-
11 testifying codefendant’s confession that explicitly implicated the defendant violated the
12 defendant’s Sixth Amendment right to confront and cross-examine the witnesses against him.⁹⁴
13 Guerrero alleges that, due to *Bruton* issues, he was unable to introduce through Maricela’s
14 testimony that Guerrero was surprised to learn that Sonia had been shot, to introduce through
15 Brenda’s testimony that Guerrero had written letters to Brenda that implicated Leon, and also to
16 introduce through Brenda’s testimony that Guerrero was surprised to learn that Sonia had been

17
18
19 ⁹⁰ ECF No. 26 at 30. Although the Nevada Supreme Court did not address the joinder of the
20 trials in the context of an ineffective-assistance-of-counsel claim, it did address the underlying
substantive claim in Guerrero’s direct appeal. ECF No. 56 at 13–15.

21 ⁹¹ *Id.* at 36.

22 ⁹² *Id.* at 38.

23 ⁹³ *Id.* at 42.

⁹⁴ 391 U.S. 123, 137 (1968); *see also Zafiro v. United States*, 506 U.S. 534, 539 (1993) (“[A]
defendant might suffer prejudice if essential exculpatory evidence that would be available to a
defendant tried alone were unavailable in a joint trial.”).

1 shot.⁹⁵ But Guerrero was prevented from introducing this evidence for reasons other than
2 *Bruton*.

3 First, during Guerrero's cross-examination of Maricela, he attempted to ask her about a
4 telephone call that she had with Brenda during the vehicle chase.⁹⁶ A hearing was held outside
5 the presence of the jury wherein Leon's trial counsel explained that there would be a *Bruton*
6 issue regarding Guerrero's reaction to hearing that Maricela told Brenda that Sonia got shot.⁹⁷
7 The state district court found that Leon's trial counsel's argument "ha[d] no merit . . .
8 whatsoever" but limited Maricela to only testifying to what Brenda said as an excited utterance
9 exception to the hearsay rule; in other words, Maricela was prohibited from mentioning anything
10 about Guerrero's reaction or "anything about [Leon]."⁹⁸

11 Second, during Guerrero's trial counsel's cross-examination of Brenda, Guerrero's trial
12 counsel attempted to introduce the letters that Guerrero wrote to Brenda that implicated Leon.⁹⁹
13 The state district court ruled that he was "not going to get the letters in. It's hearsay."¹⁰⁰
14 Guerrero's trial counsel then explained that he intended to use the letters to rebut the State's
15 questions to Brenda on direct examination that Guerrero asked Brenda to drop some of the
16 charges against him.¹⁰¹ The state district court then ruled that the letters could be used for the
17 purpose of bringing out the "passage in there where he asks her or suggests to her that she drop
18

19 ⁹⁵ ECF No. 26 at 31–36.

20 ⁹⁶ ECF No. 37 at 112.

21 ⁹⁷ *Id.* at 113, 120.

22 ⁹⁸ ECF No. 37-1 at 1–2.

22 ⁹⁹ ECF No. 37-2 at 37.

23 ¹⁰⁰ *Id.*

¹⁰¹ *Id.*

1 the charges and what will happen,” but he warned that Guerrero’s counsel could not “ask her
2 about anything than just this.”¹⁰²

3 Third, during Guerrero’s trial counsel’s cross-examination of Brenda, Guerrero’s trial
4 counsel attempted to ask Brenda how she learned that Sonia had gotten shot.¹⁰³ The jury was
5 excused, and Guerrero’s trial counsel explained that, like with Maricela, he was attempting to get
6 Brenda to explain that Guerrero was surprised to learn that Sonia had gotten shot when Maricela
7 explained this fact to Brenda on the telephone.¹⁰⁴ However, when Guerrero’s trial counsel asked
8 Brenda if “it [was] true that [the telephone call from Maricela] was the first time [Brenda] had
9 heard that Sonia had been shot,” Brenda responded that it was not.¹⁰⁵ Guerrero’s trial counsel
10 responded, “[t]hat’s news to me.”¹⁰⁶

11 Accordingly, because Maricela’s testimony was limited on hearsay grounds, the letters
12 Guerrero wrote to Brenda were also limited on hearsay grounds, and Brenda’s testimony about
13 Guerrero’s reaction to learning that Sonia had been shot was not limited by the state district court
14 but by the change in Brenda’s testimony, there were no *Bruton* issues. Indeed, the state district
15 court explained that it did not “think there’s any *Bruton* issue that keeps coming up.”¹⁰⁷
16 Therefore, Guerrero has failed to demonstrate that his trial counsel was deficient for failing to
17 move for a severance of the trials based on *Bruton* concerns or for failing to alert the state district
18 court before the trial began that Guerrero was going to testify in order to avoid any *Bruton*
19

20 ¹⁰² *Id.* at 37–38.

21 ¹⁰³ ECF No. 37-2 at 35.

22 ¹⁰⁴ *Id.*

23 ¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 36.

¹⁰⁷ *Id.*

1 issues.¹⁰⁸ The former part of this conclusion is also supported by Guerrero's trial counsel's
2 testimony at the post-conviction evidentiary hearing that he "didn't think a severance would fly"
3 because Guerrero and Leon "were so intertwined" and, in other cases he had defended, a motion
4 for severance was never fruitful due to the State's "complete store of the crime theory."¹⁰⁹

5 Because Guerrero has not shown that his trial counsel was deficient, Grounds 5 and 6 are
6 not substantial, so Guerrero has not shown that his post-conviction counsel was ineffective. And
7 because Guerrero's post-conviction counsel was not ineffective, there is no cause for Guerrero's
8 procedural default.¹¹⁰ Grounds 5 and 6 are denied as procedurally defaulted.

9 **3. Ground 7**

10 In Ground 7, Guerrero asserts that his trial counsel failed to adequately prepare for
11 trial.¹¹¹ He claims that his trial counsel should have (a) spoken to Brenda concerning the letters
12 she wrote to Guerrero while he was in jail, not his investigator, who turned Brenda against
13 Guerrero; (b) interviewed and subpoenaed Detective Rogers to testify about Guerrero's police
14 interview; (c) confronted Brenda with her police interview statement which differed from her
15 trial testimony regarding whether she or Guerrero requested that she bring her cellular telephone
16 on their trip; (d) confronted Sergeant Cervantes about his conversations with Guerrero in which
17 Guerrero explained why he kidnapped his wife and about his interview with Leon in which
18 Sergeant Cervantes suggested the conspiracy theory to Leon; and (e) confronted Detective

19
20 ¹⁰⁸ *Strickland*, 466 U.S. at 690; *see generally* *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir.
21 2004) ("We may grant habeas relief on a joinder challenge only if the joinder resulted in an
22 unfair trial. There is no prejudicial constitutional violation unless simultaneous trial of more than
one offense . . . actually rendered petitioner's state trial fundamentally unfair and hence, violative
of due process" (internal quotation marks and citations omitted)).

23 ¹⁰⁹ ECF No. 48-8 at 22, 26, 29, 40.

¹¹⁰ *See Martinez*, 566 U.S. at 9.

¹¹¹ ECF No. 26 at 44.

1 Rodriguez about the motives for his questions to Guerrero during his police interview and about
2 the fact that Guerrero denied knowing anything about the robbery of the Gallardo residence or
3 attempted murder of Sonia.¹¹²

4 *a. Interviewing Brenda*

5 Guerrero's trial counsel testified at the post-conviction hearing that he "didn't talk to
6 [Brenda]. That wouldn't be [his] place. [He did not] think that would be ethical."¹¹³ Instead,
7 Guerrero contends that his trial counsel sent his investigator to speak with Brenda and that his
8 investigator turned Brenda against him by stating that Guerrero told Leon to shoot Sonia.¹¹⁴
9 Guerrero provides no support for the latter part of this contention. So Guerrero has failed to
10 demonstrate that his trial counsel's investigator made inappropriate comments or that his trial
11 counsel's ethical concerns regarding interviewing Brenda personally amounted to a
12 deficiency.¹¹⁵

13 *b. Detective Rogers*

14 Although Detective Rogers did not testify at the trial, Detective Roger's partner,
15 Detective Maurice Rodriguez, did testify.¹¹⁶ Because Detective Rogers and Detective Rodriguez
16 interviewed Guerrero together,¹¹⁷ Guerrero has failed to demonstrate why his trial counsel
17 needed to subpoena Detective Rogers and thus has not shown that trial counsel was deficient.¹¹⁸

19 ¹¹² *Id.* at 44–70.

20 ¹¹³ ECF No. 48-8 at 34.

21 ¹¹⁴ ECF No. 26 at 44.

22 ¹¹⁵ *Strickland*, 466 U.S. at 690.

23 ¹¹⁶ *See* ECF No. 37-1 at 12.

¹¹⁷ *See* ECF No. 32-1 at 11.

¹¹⁸ *Strickland*, 466 U.S. at 690.

1 c. *Brenda's cell phone*

2 Turning next to Guerrero's contention that his trial counsel should have confronted
3 Brenda with her police interview statement that conflicted with her trial testimony concerning
4 who requested the cellular telephone, Guerrero claims that it was important for the jury to know
5 that he was the one who actually convinced Brenda to get the cellular telephone in order to keep
6 in contact with Brenda's parents.¹¹⁹ This, Guerrero argues, demonstrated his concern for
7 Brenda's family and refuted the evidence that he stole from the family and intended for Sonia to
8 get hurt.¹²⁰

9 Guerrero's contention lacks merit. Brenda testified at trial that she "convinced [Sonia] to
10 get out of the car and [Guerrero] asked for [Brenda]'s cell phone. [Brenda] thought it was a
11 better idea to have it with [her and Guerrero]; so, [she] told Sonia where it was."¹²¹ Because
12 Brenda's testimony at trial supported the fact that Guerrero requested the cellular telephone, a
13 fact that he wanted the jury to know, Guerrero fails to demonstrate that his trial counsel was
14 deficient.¹²²

15 d. *Failure to cross examine Sergeant Cervantes*

16 Next, Guerrero asserts that his trial counsel should have cross-examined Sergeant
17 Cervantes about his conversations with Guerrero during the vehicle chase (in which Guerrero
18 explained why he kidnapped Brenda) and also about his interview with Leon (in which
19 Cervantes allegedly suggested the conspiracy theory to Leon).¹²³ Sergeant Alfredo Cervantes

21 ¹¹⁹ ECF No. 26 at 60.

22 ¹²⁰ *Id.* at 61.

23 ¹²¹ ECF No. 37-2 at 13.

¹²² *Strickland*, 466 U.S. at 690.

¹²³ ECF No. 26 at 62.

1 testified that he obtained Brenda’s cellular telephone number from her parents and called it many
2 times during the afternoon and evening of November 6, 2001, while Guerrero and Brenda were
3 driving.¹²⁴ Guerrero eventually answered that phone.¹²⁵ Sergeant Cervantes and Guerrero had
4 several “lengthy conversations” in which Sergeant Cervantes “tr[ie]d to empathize, sympathize
5 with [Guerrero] in whatever he had done.”¹²⁶ Later, during the vehicle chase, Sergeant
6 Cervantes spoke with Guerrero on the cellular telephone again “to empathize with him and try to
7 get him to stop and surrender.”¹²⁷ Guerrero’s trial counsel did not cross-examine Sergeant
8 Cervantes about the substance of these conversations with Guerrero,¹²⁸ which Guerrero claims
9 would have shown that they discussed Guerrero’s need for counseling, his ability to take
10 parenting classes after this incident was over, and the reasons why he decided to kidnap his
11 wife.¹²⁹

12 But Guerrero testified at the trial and explained on several occasions that he was taking
13 Brenda to California so that they could have some alone time in order to work on their
14 relationship.¹³⁰ Because the jury was aware that Sergeant Cervantes was attempting to
15 sympathize with Guerrero during these cellular telephone conversations, and because Guerrero
16 was able to testify about his state of mind and the reasons behind his actions during the trial,

19 ¹²⁴ ECF No. 37-2 at 52, 54.

20 ¹²⁵ *Id.* at 54.

21 ¹²⁶ *Id.* at 54–55.

22 ¹²⁷ *Id.* at 56.

22 ¹²⁸ *Id.* at 58.

23 ¹²⁹ ECF No. 26 at 62–63.

¹³⁰ *See, e.g.,* ECF No. 37-3 at 17.

1 Guerrero has not shown that his trial counsel's lack of cross-examination about Sergeant
2 Cervantes's conversations with Guerrero amounted to a deficiency.¹³¹

3 Guerrero's trial counsel also did not cross examine Sergeant Cervantes about the
4 techniques he used during his police interview with Leon.¹³² However, outside the presence of
5 the jury, Leon's trial counsel asked Sergeant Cervantes about his interview with Leon, and
6 Sergeant Cervantes explained that he asked Leon questions about Leon being ordered to shoot
7 Sonia and being afraid of Guerrero in order "to elicit information from him as to get him to admit
8 that he shot Sonia."¹³³ The state district court disallowed this testimony before the jury.¹³⁴
9 Guerrero fails to demonstrate that, had *his* trial counsel sought to introduce this line of
10 questioning, as opposed to *Leon's* trial counsel, that the state district court would have allowed it.
11 Therefore, Guerrero fails to demonstrate that his trial counsel was ineffective.¹³⁵

12 *d. Failure to cross examine Detective Rodriguez*

13 Finally, Guerrero argues that his trial counsel should have cross-examined Detective
14 Rodriguez about the fact that he was instructed by Sergeant Cervantes to extract admissions that
15 Guerrero was in charge of Leon and ordered him to kill Sonia and about the fact that Guerrero
16 denied knowing anything about the robbery of the Gallardo residence or attempted murder of
17 Sonia.¹³⁶ Guerrero's trial counsel cross-examined Detective Rodriguez about the fact that a
18 sexual-assault physical examination was not performed on Brenda, the fact that the charges
19

20 ¹³¹ *Strickland*, 466 U.S. at 690.

21 ¹³² ECF No. 37-2 at 58.

22 ¹³³ *Id.* at 59.

22 ¹³⁴ *Id.* at 60.

23 ¹³⁵ *Strickland*, 466 U.S. at 690, 694.

¹³⁶ ECF No. 26 at 66–67.

1 Guerrero was being held on in California were dropped, and about the inconsistencies in
2 Detective Rodriguez's declaration of arrest.¹³⁷ Guerrero's trial counsel did not question
3 Detective Rodriguez about his interview with Guerrero.¹³⁸ Detective Rodriguez's declaration of
4 arrest reports that Guerrero "did not admit to telling Eddie to shoot Sonia" and that "he did not
5 take any jewelry from Brenda's parents' bedroom."¹³⁹ Although Guerrero's trial counsel could
6 have asked Detective Rodriguez about these statements in his report, Guerrero fails to
7 demonstrate that the result of his trial would have been different if he had.¹⁴⁰ Guerrero testified
8 consistent with these points, so the jury was already aware that Guerrero was denying culpability
9 for the robbery and attempted murder.

10 Because Guerrero has not shown that his trial counsel was deficient regarding portions of
11 Ground 7 and has not shown prejudice regarding the remainder of Ground 7, Ground 7 is not
12 substantial. Guerrero has thus not shown that his post-conviction counsel was ineffective. And
13 because Guerrero's post-conviction counsel was not ineffective, there is no cause for Guerrero's
14 procedural default.¹⁴¹ Ground 7 is denied because it is procedurally defaulted.

15 **4. Grounds 8 and 19**

16 In Ground 8, Guerrero asserts that his trial counsel failed to properly prepare him to
17 testify at trial and to competently present his side of the story through his testimony.¹⁴² In
18 Ground 19, he claims that his trial counsel unreasonably put him on the stand without adequate
19

20 ¹³⁷ ECF No 37-1 at 12, 40–41, 60.

21 ¹³⁸ ECF No. 37-2 at 40–42, 60.

22 ¹³⁹ ECF No. 32-1 at 11.

¹⁴⁰ *Strickland*, 466 U.S. at 694.

23 ¹⁴¹ *See Martinez*, 566 U.S. at 9.

¹⁴² ECF No. 26 at 70.

1 preparation and pursued an unreasonable theory of defense that Brenda had a propensity for
2 being untruthful.¹⁴³ Guerrero also argues that his trial counsel should have moved to suppress
3 his statements to the police because he was intoxicated and had been awake for four days at the
4 time of his interview.¹⁴⁴

5 *a. Failure to prepare Guerrero to testify*

6 First, regarding Guerrero's argument that his trial counsel failed to adequately prepare him
7 to testify, the state district court explained to Guerrero his constitutional rights regarding
8 testifying and the potential consequences of testifying.¹⁴⁵ During that colloquy, Guerrero
9 answered in the affirmative when asked if he had "discussed with [his] lawyer[] whether or not [he]
10 want[ed] to take the witness stand."¹⁴⁶ Later, during Leon's trial counsel's cross-examination of
11 Guerrero, the state judge recessed, and outside the presence of the jury, the following discussion
12 took place between the state district and Guerrero's trial counsel:

13 THE COURT: . . . We had an earlier meeting outside the presence of the
14 jury with [Guerrero's trial counsel] and the rest of the
15 attorneys from the State. The Court was inquiring of
16 [Guerrero's trial counsel] what his strategy was in this case
in putting his client on the stand. [Guerrero's trial counsel],
would you tell the Court your strategy behind this method?

17 [COUNSEL]: Your Honor, I don't know if we're going to settle - - I spent
18 a lot of time last night preparing for what I anticipated being
19 closing today. This is obviously a very difficult case. I think
20 [Leon's trial counsel] - - well, articulated prior to this case,
there has been no offers in this case. I'm basically
attempting to minimize the damage. I have alternative
suggested jury instructions.

21 ¹⁴³ *Id.* at 140.

22 ¹⁴⁴ *Id.* at 146.

23 ¹⁴⁵ ECF No. 37-3 at 3.

¹⁴⁶ *Id.*

1 THE COURT: I know. I understand that. You're trying to minimize
2 damages. Is that why you put your client on?

3 [COUNSEL]: That was a conscious decision between myself [sic]. In
4 another case in this Eight Judicial District.

5 THE COURT: Before we get there - - you can explain later, but it was your
6 conscious decision to do what?

7 [COUNSEL]: To have him explain away some of the State's case in the
8 last four days.

9 THE COURT: So, as I understand it correctly, you decided and it was
10 strategically a decision on your part to put him on the stand
11 and have him testify to all the things that he did on that
12 particular date; is that correct?

13 [COUNSEL]: That is correct.

14 THE COURT: He agreed to that?

15 [COUNSEL]: I do agree, and he agrees with that.

16 THE COURT: Is that right, sir?

17 GUERRERO: Yes.

18 THE COURT: Even though you're admitting a lot of the State's allegations,
19 you still wanted to do that? That was your agreement with
20 him in order to minimize some of the charges against you to
21 show that they weren't true?

22 [COUNSEL]: You have to answer the judge.

23 GUERRERO: I didn't really understand.

THE COURT: [Guerrero's trial counsel], from what [Guerrero's trial
counsel] told me, he solicited certain testimony from you to
show that some of the charges were not accurate that you've
been charged with and that you weren't guilty of some of
those charges.

GUERRERO: That's true.

THE COURT: And that's what you were trying to do by getting on the
stand; is that correct?

1 GUERRERO: Yes.

2 THE COURT: And that, in fact, is your strategy, [Guerrero's trial counsel]?

3 [COUNSEL]: That's correct, your Honor.

4 THE COURT: All right. Now, [Guerrero's trial counsel], as the Court
5 stated to you earlier about [Leon's trial counsel]'s testimony,
6 what is your strategy in reference to that?

7 [COUNSEL]: Your Honor, I think there were a couple of objectionable
8 questions, and I was busy with my notes and I will pay
9 attention a little more. I'm not sure whose side [Leon's
10 counsel] is on at this point.

11 THE COURT: Of course, he's on his client's side. That's his job to
12 represent his client.

13 [COUNSEL]: Sure.

14 THE COURT: And your job is to represent your client.

15 [COUNSEL]: That's correct.

16 THE COURT: Which I don't have any problems with, but - -

17 [COUNSEL]: I don't have any problem with him doing his job.

18 THE COURT: I don't know if you guys have a joint defense or what the
19 defense is, but I just want to put on the record the earlier
20 discussions that we had and that sort of thing. . . .¹⁴⁷

21 Guerrero's trial counsel later testified at the post-conviction evidentiary hearing that it
22 was a joint decision for Guerrero to take the stand at trial.¹⁴⁸ He explained that he and Guerrero
23 rehearsed Guerrero's trial testimony in the jail "for a few hours at a time" on "numerous"
24 occasions.¹⁴⁹ During those conversations, Guerrero's trial counsel advised Guerrero on the

25 ¹⁴⁷ ECF No. 37-3 at 28–29.

26 ¹⁴⁸ ECF No. 48-8 at 22, 25.

27 ¹⁴⁹ *Id.* at 25, 30–31.

1 ramifications of taking the stand.¹⁵⁰ Even with that preparation, Leon’s trial counsel “ambushed
2 him [on cross-examination, which] was a complete surprise to [Guerrero’s trial counsel] . . . as
3 well to Mr. Guerrero.”¹⁵¹ Guerrero’s trial counsel explained that Guerrero “was like a deer in the
4 headlights” and that he “honestly thought that [Guerrero] would have handled cross-examination
5 better but he didn’t.”¹⁵² Guerrero’s counsel also explained that he and Guerrero felt that it was
6 necessary for him to testify because they “had no one there to tell his side of the story” and
7 “thought [they] would knock out a couple of counts” with his testimony by “try[ing] to explain
8 away some of the stuff that basically Leon did [as being] outside of [the] scope and outside of
9 [Guerrero’s] knowledge.”¹⁵³

10 Clearly, Guerrero’s testimony did not go as planned. Indeed, the state district court
11 paused the proceedings during Leon’s trial counsel’s cross-examination of Guerrero to question
12 Guerrero’s trial counsel about his strategy in having his client testify.¹⁵⁴ And Guerrero’s trial
13 counsel confirmed that Guerrero did not handle cross-examination well.¹⁵⁵ However, these facts
14 do not lead to a conclusion that Guerrero’s trial counsel was deficient.¹⁵⁶ Rather, Guerrero’s trial
15 counsel explained several times that he met with Guerrero on numerous occasions to prepare his
16 testimony.¹⁵⁷ Even if Guerrero’s trial counsel was deficient for failing to prepare Guerrero

18
19 ¹⁵⁰ *Id.* at 25, 26.

20 ¹⁵¹ *Id.* at 25.

21 ¹⁵² *Id.* at 25, 32.

22 ¹⁵³ *Id.* at 26–28, 33.

23 ¹⁵⁴ ECF No. 37-3 at 28–29.

¹⁵⁵ ECF No. 48-8 at 25, 32.

¹⁵⁶ *Strickland*, 466 U.S. at 690.

¹⁵⁷ *Id.* at 25, 30–31.

adequately, Guerrero fails to demonstrate prejudice.¹⁵⁸ Guerrero’s trial counsel explained that he thought “the same result would have resulted had [Guerrero] not taken the stand” because there “was just so much overwhelming evidence” and “it was just a tough case.”¹⁵⁹ Guerrero fails to prove otherwise.

b. The Brenda-had-a-propensity-for-violence theory of defense

Next, Guerrero contends that his trial counsel pursued an unreasonable theory of defense that Brenda had a propensity for violence. While this may have been a point that the defense pointed to during trial, it appears that Guerrero’s trial counsel’s main defense was that Guerrero did not know about or participate in the attempted murder of Sonia. In fact, Guerrero’s trial counsel testified that their defense was that Guerrero did not know about the attempted murder, which they tried to prove by “separat[ing Guerrero] and Leon through [Guerrero’s] testimony.”¹⁶⁰ Accordingly, Guerrero fails to demonstrate a deficiency.¹⁶¹

c. Failure to move to suppress police interview

Finally, Guerrero contends that his trial counsel should have moved to suppress his police interview statements because they were involuntary due to his intoxication. Guerrero testified that he had been “out smoking weed and drinking the night before” the incident and that he did not sleep that night “because [he] was so worried” about Brenda lying.¹⁶² Guerrero also testified that he had been awake for “like two-and-a-half days” at the time he gave his statement

¹⁵⁸ *Id.* at 694.

¹⁵⁹ ECF No. 48-8 at 51, 65.

¹⁶⁰ ECF No. 48-8 at 27–28, 33.

¹⁶¹ *Strickland*, 466 U.S. at 690.

¹⁶² ECF No. 37-3 at 12, 23.

1 to the police.¹⁶³ Brenda also testified that Guerrero “smoked some marijuana” during one of
2 their stops in California following her kidnapping.¹⁶⁴

3 At the post-conviction evidentiary hearing, Guerrero’s trial counsel testified that he did
4 not contemplate attempting to suppress Guerrero’s statements because he had not seen a
5 statement be found “inadmissible because [a defendant] didn’t know what he was saying.”¹⁶⁵ To
6 be sure, the admission into evidence at trial of an involuntary statement violates a defendant’s
7 right to due process under the Fourteenth Amendment.¹⁶⁶ However, “coercive police activity is a
8 necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the
9 Due Process Clause of the Fourteenth Amendment.”¹⁶⁷ Although a defendant’s mental state is a
10 “significant factor in the ‘voluntariness’ calculus,” it “does not justify a conclusion that a
11 defendant’s mental condition, by itself and apart from its relation to official coercion, should
12 ever dispose of the inquiry into constitutional ‘voluntariness.’”¹⁶⁸ Because Guerrero fails to
13 allege any police coercion, his trial counsel’s decision not to file a motion to suppress his
14 statement based on its alleged involuntariness was not deficient.¹⁶⁹

17 ¹⁶³ *Id.* at 41.

18 ¹⁶⁴ ECF No. 37-2 at 18, 40.

19 ¹⁶⁵ ECF No. 48-8 at 53.

20 ¹⁶⁶ *Lego v. Twomey*, 404 U.S. 477, 478 (1972); *Jackson v. Denno*, 378 U.S. 368, 376 (1964) (“It
21 is now axiomatic that a defendant in a criminal case is deprived of due process of law if his
22 conviction is founded, in whole or in part, upon an involuntary confession”); *see also Dickerson*
v. United States, 530 U.S. 428, 444 (2000) (explaining that the requirement that *Miranda* rights
be given prior to a custodial interrogation does not dispense with a due-process inquiry into the
voluntariness of a confession).

23 ¹⁶⁷ *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

¹⁶⁸ *Id.* at 164.

¹⁶⁹ *Strickland*, 466 U.S. at 690.

1 Because Guerrero has not shown that his trial counsel was deficient, Grounds 8 and 19
2 are not substantial, so Guerrero has not shown that his post-conviction counsel was ineffective.
3 And because Guerrero's post-conviction counsel was not ineffective, there is no cause for
4 Guerrero's procedural default.¹⁷⁰ Grounds 8 and 19 are denied because they are procedurally
5 defaulted.

6 **2. Grounds 9 and 16**

7 In Ground 9, Guerrero argues that his trial counsel failed to object seventeen critical
8 times during Leon's trial counsel's cross-examination of him.¹⁷¹ Similarly, in Ground 16,
9 Guerrero argues that his trial counsel failed to object to seven instances during Leon's trial
10 counsel's cross-examination of him and other witnesses, and five points during his closing
11 argument.¹⁷² Some of Guerrero's contentions in Ground 9 overlap with his contentions in
12 Ground 16.

13 First, Guerrero takes issue with the following italicized questions posed to him by Leon's
14 trial counsel during cross-examination:

15 Q. I thought you told the jury that Eddy woke you up?

16 A. Eddy did wake me up.

17 Q. *He wasn't with you, you magically dropped him off?*

18 A. I dropped him off like around 11:00 or 12:00 at his
19 girlfriend's house.

20 ...
21

22 ¹⁷⁰ See *Martinez*, 566 U.S. at 9.

23 ¹⁷¹ ECF No. 26 at 74–79.

¹⁷² *Id.* at 124–28. I previously dismissed the remainder of the claims in Ground 16. See ECF No. 98 at 13.

1 Q. In that 92 pages [of the police interview], you give a
2 multitude of different versions about what happened that
3 day, don't you?

4 A. Yes, I did.

5 Q. And the versions you tell the police officers, those are
6 different than the version you told the people of the jury
7 today, right?

8 A. Yes.

9 Q. *Did you think you were supposed to lie to the cops when
10 you were giving this statement?*

11 A. No, but I was confused and I didn't know - - I couldn't
12 remember the way things happened that night.

13 ...

14 A. . . . Every husband is jealous when it comes to his wife.

15 Q. *Every husband hog-ties his wife and he's jealous, is that
16 what you're telling me?*

17 A. I think hog-tie is when you tie somebody's hands behind
18 their back and I didn't do that.

19 Q. *You seem to know a lot about tying people up. How did you
20 tie her?*

21 A. Just her ankles, and I put tape around her mouth.

22 ...

23 Q. You wanted to shut her up?

24 A. That's because she kept screaming at me, yes.

25 Q. *She shouldn't do that, right after you punch her in the face,
26 right? She shouldn't have the right to yell at you?*

27 A. Well, she had a right to yell at me, I guess.

28 ...

29 A. The night before she promised me that she wasn't talking to
30 anybody else, and I asked her to promise me and hope for
31 me to die that she wasn't talking to nobody else.

32 Q. *By talking to nobody else, this is after you put her out of the
33 house, she wasn't allowed to talk to any men, right?*

1 A. We were still together, that's why, and we had made an
2 agreement that we would get back together as soon as we
3 work everything out that we were going through, the little
things that we were going through. They were stupid
things.

4 Q. *According to Brenda, you told her you had been having
relations with a girl at Burger King, right?*

5 A. That's what she said but that's not true.

6 ...
7 Q. Let me show you what's been entered as State's exhibit
8 129. It's a certified copy of the phone bill. Why don't you
tell the jury where that phone bill goes to as the billing
address?

9 A. It says 1518 Juniper Twig.

10 Q. That's not your house, is it?

11 A. No, it's not, but what's the date on that phone bill?

12 Q. *This is a certified copy of Brenda's phone bill and the date
is January 2, 2002.*

13 A. Exactly. This happened in November.

14 ...
15 Q. *But she's not allowed to talk to men even though you threw
her out of the house?*

16 A. That's because we're still together, we're still married.

17 Q. But you can see who you want to see?

18 A. I wasn't seeing anybody. There's no proof of that.

19 Q. *Brenda must be lying, huh?*

20 A. I don't know why that came up.

21 ...
22 Q. You had been to the service?

23 A. Yes.

Q. *In the service in basic training, this Navy basic training
that you went to, they teach you to punch women in the
face?*

1 A. No. There's a domestic violence - -

2 Q. Answer my question.

3 COURT: Counsel, you're being argumentative.

4 ...

5 Q. *In this Navy basic training, they teach you to take 16-year-*
old kinds with you to watch your children while you're
going to beat your wife?

6 A. No.

7 COURT: What did I just tell you, [Leon's trial counsel]? If you can't
8 ask the questions properly, you're not going to be allowed
9 to ask any more questions.

10 ...

11 Q. *You told the police officers that you had never hit Brenda*
before November 6th, 2001, correct?

12 A. That's true.

13 Q. Is that your testimony today?

14 A. I never hit her before. That's still true. That time that I did
15 hit her was the only time that I ever hit her before.

16 Q. *Why did she leave the house six months earlier?*

17 A. Because we were having arguments and stuff like that
18 about me being with my friends a lot and stuff like that and
19 her not being able to - -

20 COURT: Excuse me. That's irrelevant.

21 ...

22 A. I love my wife.

23 Q. *What part of what you did November 6th, in your mind,*
indicates being in love with your wife - - punching her in
the face?

24 A. No.

25 Q. Tying her up?

26 A. No.

27 Q. *Threatening to kill your kids?*

28 A. I never did that.

1 Q. *Beating her in front of your kids?*

2 A. I did not mean to do that.

3 Q. What part of any of those acts constitutes love, in your
4 mind?

5 A. In the eyes of everybody else, none.

6 Q. . . .
7 *So you were lying to the jury earlier when you said that you
8 were asking people to do things, you were ordering this
9 young man - -*

10 A. No.

11 Q. - - *to take your orders, weren't you?*

12 A. No.¹⁷³

13 Second, Guerrero takes issue with questions posed by Leon's trial counsel to Steve
14 Odum, Maricela, and Sergeant Cervantes. Steve Odum, the Gallardos' neighbor, testified about
15 assisting Sonia after she came to his residence following being shot.¹⁷⁴ During cross-
16 examination, Leon's trial counsel asked Odum if "appeared that Sonia knew one of the
17 individuals."¹⁷⁵ Odum answered in the affirmative and then confirmed that Guerrero—and, by
18 default, not Leon—was the "only name [he] refer[red] to" in his testimony and to the 911
19 operator.¹⁷⁶ Next, Leon's trial counsel asked Maricela if she "gave information to the police
20 officers, and then . . . came to court [and] testified, at least in part, to try to help [her]
21 brother?"¹⁷⁷ Last, Leon's trial counsel attempted to question Sergeant Cervantes about

22 ¹⁷³ ECF No. 37-3 at 23–30.

23 ¹⁷⁴ ECF No. 36-10 at 20.

¹⁷⁵ *Id.* at 22.

¹⁷⁶ *Id.*

¹⁷⁷ ECF No. 37-1 at 10.

1 conversations Leon had with detectives, during which Leon allegedly indicated his fear of
2 Guerrero; however, the state district court held a hearing outside the presence of the jury and
3 disallowed the questions.¹⁷⁸ Prior to the hearing outside the presence of the jury, Leon’s trial
4 counsel asked Sergeant Cervantes, “You told [the prosecutor] about a conversation that you had
5 had when Detective Martines and Arojo and Mr. Leon was present?”¹⁷⁹

6 Third, Guerrero takes issue with five comments Leon’s trial counsel made during his
7 closing argument. Leon’s trial counsel argued that Leon had nothing to do with stealing the
8 Gallardos’ jewelry; that “Leon [was] not the principal anywhere on November 6th, 2001”; that
9 “[t]he facts in this case about the shooting are far from as clear” because Detective Rodriguez
10 wrote in his report that “Sonia had told somebody that [Guerrero] shot her. And then she told
11 them that [Leon] shot her”; that “mere presence and companionship before and after in and of
12 itself is not sufficient to support a conviction”; and that he was “the one that questioned Brenda
13 and Sonia in . . . a non-offensive fashion to get them to tell [the jury] what happened that day,
14 and [he was] the one that went after [Guerrero] to get him to tell [the jury] what happened that
15 day.”¹⁸⁰

16 *a. Failure to object to questioning of Guerrero*

17 To be sure, as Guerrero contends, many of Leon’s trial counsel’s cross-examination
18 questions to Guerrero were argumentative, for example, asking whether Guerrero thought he
19 should lie to the police, whether Guerrero knew a lot about tying people up, and whether
20 Guerrero learned to beat his wife in basic training. Guerrero also argues that his trial counsel

21
22 ¹⁷⁸ ECF No. 37-2 at 59–60.

23 ¹⁷⁹ *Id.* at 59.

¹⁸⁰ ECF No. 37-4 at 35–39.

1 should have objected to Leon's trial counsel's question about Guerrero having relations with
2 another woman on relevancy grounds, the presentation of the copy of Brenda's cellular telephone
3 bill on the ground that the date was misstated, and the implied references that Guerrero had hit
4 Brenda on earlier occasions on the basis that it was an uncharged act.¹⁸¹ Because Guerrero's
5 trial counsel later testified that Guerrero did not handle cross-examination very well and was
6 blindsided by some of Leon's trial counsel's questions,¹⁸² it can be concluded that Guerrero's
7 trial counsel's failure to object to these questions fell below an objective standard of
8 reasonableness.¹⁸³ Indeed, Guerrero's trial counsel explained that "there were a couple of
9 objectionable questions, and [he] was busy with [his] notes and [would] pay attention a little
10 more."¹⁸⁴ So, even though "[a]n attorney's failure to object to the admission of inadmissible
11 evidence is not necessarily ineffective,"¹⁸⁵ that does not appear to be the case here.

12 But this deficiency alone is not enough. Guerrero fails to demonstrate that the result of
13 his trial would have been different had his trial counsel made these objections.¹⁸⁶ During direct
14 examination, Guerrero admitted that he committed the acts charged with the exception of
15 sexually assaulting Brenda and participating in the attempted murder of Sonia.¹⁸⁷ So Guerrero's
16 character was already strained before these argumentative questions were even posed. Plus,

18 ¹⁸¹ The state district court previously ruled that the State was prohibited from questioning Brenda
19 about why she left the marital residence because it alluded to an uncharged crime of domestic
20 violence. *See* ECF No. 37-2 at 38.

20 ¹⁸² ECF No. 48-8 at 25, 32.

21 ¹⁸³ *Strickland*, 466 U.S. at 690.

22 ¹⁸⁴ ECF No. 37-3 at 28–29.

23 ¹⁸⁵ *Morris v. California*, 966 F.2d 448, 456 (9th Cir. 1991) ("We need not determine the actual
explanation for trial counsel's failure to object, so long as his failure to do so falls within the
range of reasonable representation.").

¹⁸⁶ *Strickland*, 466 U.S. at 694.

¹⁸⁷ *See* ECF No. 37-3 at 8-23.

1 Guerrero's trial counsel testified at the post-conviction evidentiary hearing that, because the state
2 district court disallowed Leon's duress jury instruction, he believed that the impact of Leon's
3 trial counsel's cross-examination of Guerrero was minimal or none because he was not able to
4 later argue anything duress related.¹⁸⁸

5 *b. Failure to object to Leon's counsel's questions to other witnesses*

6 Guerrero fails to demonstrate deficiency regarding to the questions posed by Leon's trial
7 counsel to Odum, Maricela and Sergeant Cervantes.¹⁸⁹ Leon's trial counsel's question to Odum
8 about Guerrero's name being the only one that Sonia mentioned was proper based on the facts of
9 the case. In fact, Sonia testified that she had never met Leon and did not know his name.¹⁹⁰
10 Next, Leon's trial counsel's question about Maricela's reason for testifying was also proper.¹⁹¹
11 And contrary to Guerrero's urging, the jury heard no evidence about Sergeant Cervantes's theory
12 that Leon was fearful of Guerrero because the state district court immediately held a hearing
13 outside the presence of the jury following an innocuous question posed by Leon's trial
14 counsel.¹⁹² Because Guerrero fails to demonstrate that the testimony "would not have been
15 admissible" had his trial counsel not failed to object to its admission,¹⁹³ Guerrero's claim lacks
16 merit.

19 ¹⁸⁸ ECF No. 48-8 at 60.

20 ¹⁸⁹ *Strickland*, 466 U.S. at 690.

21 ¹⁹⁰ ECF No. 36-10 at 15.

22 ¹⁹¹ *See Reynoso v. Giurbino*, 462 F.3d 1099, 1115 (9th Cir. 2006) (explaining that the "failure to
cross-examine [a] witness about their motivation for testifying as they did . . . [is]
unreasonable").

23 ¹⁹² ECF No. 37-2 at 59–60.

¹⁹³ *United States v. Bosch*, 914 F.2d 1239, 1246–47 (9th Cir. 1990).

1 c. *Failure to object to closing argument*

2 With respect to Leon’s trial counsel’s closing argument, Guerrero again fails to
3 demonstrate deficiency.¹⁹⁴ First, Leon’s trial counsel arguments were based on inferences that
4 could be drawn from the evidence presented at the trial.¹⁹⁵ Second, the jury was instructed that
5 “[s]tatements, arguments and opinions of counsel are not evidence.”¹⁹⁶ Finally, as Guerrero’s
6 trial counsel pointed out at the post-conviction evidentiary hearing, Leon’s trial counsel
7 primarily attacked the pleadings in his closing argument.¹⁹⁷ Thus, even if Leon’s trial counsel’s
8 arguments were improper, they were relatively minor statements compared to the bulk of the
9 closing argument itself.

10 Because Guerrero has not shown that his trial counsel was deficient—or, in the instances
11 in which his trial counsel was deficient, has not shown prejudice—Grounds 9 and 16 are not
12 substantial, so Guerrero has not shown that his post-conviction counsel was ineffective. And
13 because Guerrero’s post-conviction counsel was not ineffective, there is no cause for Guerrero’s
14 procedural default.¹⁹⁸ Grounds 9 and 16 are denied because they are procedurally defaulted.

15 **3. Grounds 10, 15(2), and 15(3)**

16 In Ground 10, Guerrero argues that his trial counsel failed to object to Jury Instructions
17 10, 16, 17, and 18, which shifted or lessened the State’s burden of proof to prove each element of
18
19

20 ¹⁹⁴ *Strickland*, 466 U.S. at 690.

21 ¹⁹⁵ *See, e.g., Drayden v. White*, 232 F.3d 704, 713 (9th Cir. 2000) (concluding that an improper
22 closing argument did not infect the trial with unfairness because arguments “were supported by
the evidence and reasonable inferences that could be drawn from the evidence”).

23 ¹⁹⁶ ECF No. 37-7 at 13.

¹⁹⁷ ECF No. 48-8 at 50.

¹⁹⁸ *See Martinez*, 566 U.S. at 9.

1 the crimes charged beyond a reasonable doubt.¹⁹⁹ In Ground 15(2), Guerrero argues that Jury
2 Instruction Nos. 10 and 17 failed to properly instruct the jury on the specific intent elements of
3 first-degree kidnapping and attempted murder.²⁰⁰ And in Ground 15(3), Guerrero argues that
4 Jury Instruction No. 18 did not inform the jury that, in order for him to be convicted of the
5 deadly weapon enhancement on the kidnapping and attempted-murder charges related to Sonia, he
6 must have had either actual or constructive possession of Leon's weapon.²⁰¹

7 The jury was instructed as follows regarding intent and conspiracy and aiding and
8 abetting:

9 Jury Instruction No. 9: Conspiracy is an agreement or mutual understanding
10 between two or more persons to commit a crime. To
11 be guilty of conspiracy, a defendant must intend to
12 commit, or to aid in the commission of, the specific
intent agreed to. The crime is the agreement to do
something unlawful; it does not matter whether it
was successful or not.

13 Jury Instruction No. 10: Each member of a criminal conspiracy is liable for
14 each act and bound by each declaration of every
15 other member of the conspiracy if the act or the
16 declaration is in furtherance of the object of the
17 conspiracy. The act of one conspirator pursuant to or
18 in furtherance of the common design of the
19 conspiracy is the act of all conspirators. Every
20 conspirator is legally responsible for an act of a co-
21 conspirator that follows as one of the probable and
22 natural consequences of the object of the conspiracy
23 even if it was not intended as part of the original plan
and even if he was not present at the time of the
commission of such act.

¹⁹⁹ ECF No. 26 at 80–81.

²⁰⁰ *Id.* at 112, 115.

²⁰¹ *Id.* at 116.

1 Jury Instruction No. 16: Where two or more persons are accused of
2 committing a crime together, their guilt may be
3 established without proof that each personally did
4 every act constituting the offense charged. All
5 persons concerned in the commission of a crime who
6 either directly and actively commit the act
7 constituting the offense or who knowingly and with
8 criminal intent aid and abet in its commission or,
9 whether present or not, who advise and encourage its
10 commission, with the intent that the crime be
11 committed, are regarded by the law as principals in
12 the crime thus committed and equally guilty thereof.
13 A person aids and abets the commission of a crime if
14 he knowingly and with criminal intent aids,
15 promotes, encourages or instigates by act or advice,
16 or by act and advice, the commission of such crime
17 with the intention that the crime be committed. The
18 State is not required to prove precisely which
19 defendant actually committed the crime and which
20 defendant aided and abetted.

11 Jury Instruction No. 17: Where two or more persons join together in a
12 common design to commit any unlawful act, each is
13 criminally responsible for the acts of his confederates
14 committed in furtherance of the common design. In
15 contemplation of law, the act of one is the act of all.

14 ...
15 Jury Instruction No. 18: The participation of a defendant not actually in
16 possession of the weapon by aiding or abetting the
17 actual user in the unlawful use of the weapon, makes
18 a defendant equally subject to the added weapon
19 enhancement available to the user who commits a
20 crime through the use of a deadly weapon.²⁰²

19 a. *Jury Instructions 10, 16, and 17*

20 The State charged Guerrero with the first-degree kidnapping of Brenda and Sonia and
21 with the attempted murder of Sonia under either a conspiracy or an aiding-and-abetting theory of
22

23

²⁰² ECF No. 37-7 at 16, 22–23, 25.

1 criminal liability.²⁰³ Guerrero was found guilty of these charges.²⁰⁴ The jury’s reliance on a
2 particular theory of liability is unclear.²⁰⁵

3 Prior to Guerrero’s trial, “aiders and abettors [we]re criminally responsible for all harms
4 that [we]re a natural, probable, and foreseeable result of their actions.”²⁰⁶ Approximately a year
5 before Guerrero’s trial, the Nevada Supreme Court stepped back from this test and, in *Sharma v.*
6 *State*, narrowed the definition of aiding and abetting by holding that “in order for a person to be
7 held accountable for the specific intent crime of another under an aiding or abetting theory of
8 principal liability, the aider or abettor must have knowingly aided the other person with the intent
9 that the other person commit the charged crime.”²⁰⁷ The Nevada Supreme Court clarified in
10 *Sharma* that it was “disavow[ing] and abandon[ing] the [natural and probable consequences]
11 doctrine.”²⁰⁸ Pertinently, attempted murder and first-degree kidnapping are specific-intent
12 crimes.²⁰⁹

15 ²⁰³ ECF No. 37-5 at 5–7.

16 ²⁰⁴ ECF No. 37-10 at 4–6.

17 ²⁰⁵ *Cf. Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (“A conviction based on a general verdict is
18 subject to challenge if the jury was instructed on alternative theories of guilt and may have relied
on an invalid one.”).

19 ²⁰⁶ *Mitchell v. State*, 971 P.2d 813, 820 (Nev. 1998), *overruled in relevant part by Sharma v.*
State, 56 P.3d 868, 872 (Nev. 2002).

20 ²⁰⁷ *Sharma*, 56 P.3d at 872.

21 ²⁰⁸ *Id.*; *see also Bolden v. State*, 124 P.3d 191, 200-01 (Nev. 2005) (holding that “a defendant
22 may not be held criminally liable for the specific intent crime committed by a coconspirator
simply because that crime was a natural and probable consequence of the object of the
conspiracy”), *overruled on other grounds by Cortinas v. State*, 195 P.3d 315, 324 (Nev. 2008).

23 ²⁰⁹ *See Keys v. State*, 766 P.2d 270, 273 (Nev. 1988) (“Attempted murder is the performance of
an act or acts which tend, but fail, to kill a human being, when such acts are done with express
malice, namely, with the deliberate intention unlawfully to kill.”); *Bolden*, 124 P.3d at 201.

1 Guerrero's argument focuses on the fact that a petitioner's due-process rights are violated
2 if a jury instruction "ha[s] the effect of relieving the State of the burden of proof enunciated in
3 *Winship* on the critical question of petitioner's state of mind."²¹⁰ So the issue here is whether
4 Guerrero's trial counsel was ineffective in failing to object to the jury instructions because, when
5 analyzed as a whole, the jury instructions ran afoul of *Sharma* by eliminating the requirement
6 that the jury find that Guerrero had the requisite intent to commit first-degree kidnapping and
7 attempted murder.

8 Jury Instruction No. 10's language that "[e]very conspirator is legally responsible for an
9 act of a co-conspirator that follows as one of the probable and natural consequences of the object
10 of the conspiracy" appears to endorse the natural-and-probable-consequences doctrine, which
11 was disavowed a year before Guerrero's trial.²¹¹ So Guerrero's trial counsel's failure to
12 challenge this instruction "fell below an objective standard of reasonableness."²¹² But Guerrero
13 fails to demonstrate that the result of his trial would have been different had his trial counsel
14 challenged the instruction.²¹³ Indeed, Jury Instruction Nos. 9 and 16 properly required a finding
15 that Guerrero possessed the requisite intent established in *Sharma*. Jury Instruction No. 9
16 advised that, "[t]o be guilty of conspiracy, a defendant must intend to commit, or to aid in the
17 commission of, the specific intent agreed to," and Jury Instruction No. 16 provided that "[a]ll
18 persons concerned in the commission of a crime who . . . knowingly and with criminal intent aid

20 ²¹⁰ *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979); *see also In re Winship*, 397 U.S. 358, 364
21 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof
22 beyond a reasonable doubt of every fact necessary to constitute the crime with which he is
charged."); *Evanchyk v. Stewart*, 340 F.3d 933, 939 (9th Cir. 2003) ("It is a violation of due
process for a jury instruction to omit an element of the crime.").

23 ²¹¹ *See Sharma*, 56 P.3d at 872.

²¹² *See Strickland*, 466 U.S. at 688.

²¹³ *Id.* at 694.

1 and abet in its commission or . . . who advise and encourage its commission, with the intent that
2 the crime be committed, are regarded by the law as principals.”²¹⁴

3 ***b. Jury Instruction No. 18***

4 Prior to Guerrero’s trial, in *Anderson v. State*, the Nevada Supreme Court generally stated
5 that “the participation of a defendant not actually in possession of the weapon by aiding and
6 abetting the actual user in the unlawful use of the weapon, makes the former equally subject to
7 the added penalty inflicted upon defendants who commit crimes through the use of deadly
8 weapons.”²¹⁵ This general statement mirrors Jury Instruction No. 18.²¹⁶ But the Nevada
9 Supreme Court in *Anderson* also stated that “the possession necessary to justify statutory
10 enhancement may be actual or constructive; it may be exclusive or joint” and “[c]onstructive or
11 joint possession may occur only when the unarmed participant has knowledge of the other
12 offender’s being armed, and where the unarmed offender has . . . the ability to exercise control
13 over the firearm.”²¹⁷ This remained the law in Nevada until 2008, after Guerrero’s trial.²¹⁸
14 Because Jury Instruction No. 18 merely stated *Anderson*’s generic principle but failed to include
15
16
17

18 ²¹⁴ ECF No. 37-7 at 15, 22.

19 ²¹⁵ *Anderson v. State*, 600 P.2d 241, 243 (Nev. 1979), *abrogated by Brooks v. State*, 180 P.3d
20 657 (Nev. 2008).

21 ²¹⁶ *See* ECF No. 37-7 at 25.

22 ²¹⁷ *Anderson*, 600 P.2d at 244.

23 ²¹⁸ *See Brooks*, 180 P.3d at 661 (rejecting *Anderson*’s constructive possession test and
“conclud[ing] that an unarmed offender ‘uses’ a deadly weapon and therefore is subject to a
sentence enhancement when the unarmed offender is liable as a principal for the offense that is
sought to be enhanced, another principal to the offense is armed with and uses a deadly weapon
in the commission of the offense, and the unarmed offender had knowledge of the use of the
deadly weapon”).

1 the constructive-possession test, it appears that Guerrero's trial counsel was deficient in failing to
2 remedy the error.²¹⁹

3 But because the facts demonstrate that Guerrero had constructive possession of Leon's
4 firearm, Guerrero fails to demonstrate prejudice.²²⁰ Brenda testified that, before Guerrero tied
5 her up in the van, he directed Leon to get his gun, which he had left in a bush in front of the
6 residence.²²¹ At first Leon could not locate the gun, but after Guerrero again explained where he
7 had hidden it, Leon found it and gave it to Guerrero.²²² Guerrero then asked Leon, "'Do you
8 have your gun?' and [Leon] nodded yes and patted his pocket.'"²²³ Importantly, Brenda also
9 testified that both guns were Guerrero's.²²⁴ Because Guerrero had knowledge that Leon was
10 armed and because Guerrero exercised control over Leon and his firearm, thereby meeting the
11 constructive-possession test in *Anderson*, Guerrero fails to demonstrate that it is reasonably
12 probable that, but for trial counsel's error in failing to correct Jury Instruction No. 18, the result
13 of his trial would have been different.²²⁵

14 Because Guerrero has not shown prejudice regarding his trial counsel's deficiencies
15 regarding Jury Instruction Nos. 10 and 18, Grounds 10, 15(2), and 15(3) are not substantial.
16 Thus, Guerrero has not shown that his post-conviction counsel was ineffective. And because
17 Guerrero's post-conviction counsel was not ineffective, there is no cause for Guerrero's

18
19 ²¹⁹ See *Strickland*, 466 U.S. at 688.

20 ²²⁰ *Id.* at 694.

21 ²²¹ ECF No. 37-2 at 11.

22 ²²² *Id.*

23 ²²³ *Id.*; see also ECF No. 37-3 (testimony of Guerrero that both guns were in the trunk of his vehicle prior to the incidents).

²²⁴ ECF No. 37-2 at 45.

²²⁵ *Strickland*, 466 U.S. at 694.

1 procedural default.²²⁶ Grounds 10, 15(2), and 15(3) are denied because they are procedurally
2 defaulted.

3 **4. Grounds 11 and 15(5)**

4 In Grounds 11 and 15(5), Guerrero argues that his trial counsel failed to request a jury
5 instruction on his theory of defense regarding the sexual-assault charges.²²⁷ Guerrero asserts that
6 his trial counsel should have requested the following mistaken-belief-of-consent jury instruction:

7 It is a defense to a charge of sexual assault that the Defendant
8 entertained a reasonable and good faith belief that the female
9 person voluntarily consented to engage in sexual intercourse. If
10 from all the evidence you have a reasonable doubt whether the
11 Defendant reasonably and in good faith believed she voluntarily
12 consented to engage in sexual intercourse, you must give the
13 Defendant the benefit of that doubt and find him not guilty of said
14 charge. A belief that is based upon ambiguous conduct by an
15 alleged victim that is the product of force, violence, duress,
16 menace, or fear of immediate and unlawful bodily injury on the
17 person or another is not a reasonable good faith belief.²²⁸

18 In Guerrero's appeal from the denial of his first state habeas petition, the Nevada
19 Supreme Court rejected this theory, concluding that he had failed to show deficiency or
20 prejudice:

21 [A]ppellant argues that his trial counsel was ineffective for failing
22 to propose a jury instruction defining consent, failing to argue that
23 the instructions did not inform the jury that a victim must resist for
the sexual act to not have been consensual. Appellant argues that,
had the jury been properly instructed, it would have concluded that
the victim actually consented to the sexual assault as the victim did
not physically or mentally resist appellant. Appellant fails to
demonstrate that his trial counsel's performance was deficient or
that he was prejudiced.

22 ²²⁶ See *Martinez*, 566 U.S. at 9.

23 ²²⁷ ECF No. 26 at 85, 120.

²²⁸ *Id.* at 86 (citing *Honeycutt v. State*, 56 P.3d 362 (Nev. 2002)).

1 There was overwhelming evidence that the sexual act occurred
2 against the victim's will or under conditions in which appellant
3 new or should have known that the victim was mentally or
4 physically incapable of resisting. *See Shannon v. State*, 105 Nev.
5 782, 790, 783 P.2d 942, 947 (1989) (citing NRS 200.366). The
6 circumstances surrounding the sexual act in this case demonstrate
7 that appellant used physical force against the victim and threats of
8 physical force against the victim, her children, and her parents to
9 coerce the victim to submit to sexual intercourse. "Submission is
10 not the equivalent of consent." *McNair v. State*, 108 Nev. 53, 57,
11 825 P.2d 571, 574 (1992) (citing *Tryon v. State*, 567 P.2d 290, 293
12 (Wyo. 1977)). Further, the evidence demonstrated that the victim
reasonably manifested her opposition to engage in sexual acts
under these circumstances. *See id.* (citing *Dinkens v. State*, 92
Nev. 74, 78, 546 P.2d 228, 230 (1976)). Appellant fails to
demonstrate that reasonably competent counsel would have argued
for further instructions regarding consent under the circumstances
of this case. Moreover, as there was overwhelming evidence that
the victim did not consent, appellant fails to demonstrate a
reasonable probability that the outcome of the trial would have
been different had counsel sought additional instructions regarding
consent. Therefore, the district court did not err in denying this
claim.²²⁹

13 Brenda testified that, after she let Guerrero into the residence on November 6, 2001, he
14 attempted to initiate sexual intercourse with her, but she declined.²³⁰ After Guerrero punched
15 Brenda, disabled the telephone to keep her from calling the police, and told her he was taking her
16 and the children to Mexico, Guerrero "said that if [Brenda] had sex with him, he would leave; so,
17 [Brenda] agreed."²³¹ Brenda later clarified that "[she] asked what [Guerrero] wanted from [her],
18 and if all he wanted was to have sex, and [she] said, 'If we have sex, would you leave?' And he
19 said, 'Yes.'"²³² Brenda testified that, even though she did not resist, she did not want to have
20 sexual intercourse with Guerrero and cried during the sexual encounter because she "was upset

21 _____
22 ²²⁹ ECF No. 14-5 at 3–4.

23 ²³⁰ ECF No. 37-2 at 7.

²³¹ *Id.* at 9.

²³² *Id.*

1 and scared.”²³³ Due to the circumstances, Brenda felt coerced to have sexual intercourse with
2 Guerrero.²³⁴ Brenda later told law enforcement what happened regarding the sexual encounter,
3 but at that time, she did know whether the circumstances amounted to rape.²³⁵ Brenda confirmed
4 that law enforcement did not suggest that she had been raped.²³⁶

5 Regarding the sexual encounter, Guerrero testified that Brenda “asked [him] if [he]
6 wanted to do it . . . and after that, will [he] go home.”²³⁷ Guerrero indicated that he was not sure
7 how to proceed and responded, “[i]f you want to, I guess it’s cool,’ . . . [b]ecause [he] wanted to
8 make it up to her because [he] love[d his] wife and [he] had never hit her before; so, [he] felt bad
9 about it.”²³⁸ Guerrero testified that Brenda took her clothes off voluntarily and that although he
10 started to have sexual intercourse with Brenda, he stopped because his mind was not in it due to
11 the telephone bill.²³⁹

12 The heart of Guerrero’s argument is that the district court prevented him from
13 establishing his defense theory by denying his proposed instruction on mistaken belief of
14 consent.²⁴⁰ Guerrero argues that his trial counsel was deficient for not attempting to introduce a
15 jury instruction on mistaken belief of consent, especially since he made a similar argument in his
16
17

18 ²³³ *Id.*

19 ²³⁴ *Id.* at 47.

20 ²³⁵ *Id.* at 41.

21 ²³⁶ *Id.*

22 ²³⁷ ECF No. 37-3 at 15.

23 ²³⁸ *Id.*

²³⁹ *Id.* at 16.

²⁴⁰ *See Mathews v. United States*, 485 U.S. 58, 63 (1988) (“As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.”).

1 closing argument.²⁴¹ A review of the record, however, demonstrates that Guerrero’s trial counsel
2 did not address mistaken belief of consent in his closing argument; rather, he simply argued that
3 Brenda and Guerrero had consensual sexual intercourse.²⁴² And the jury was instructed
4 thoroughly about consent, albeit not mistaken belief of consent.²⁴³

5 Even if Guerrero’s trial counsel was deficient, the Nevada Supreme Court reasonably
6 determined that Guerrero failed to demonstrate prejudice.²⁴⁴ While Brenda may have initiated
7 the sexual encounter, she did so in order to get Guerrero to leave her and her children alone.
8 Brenda was in fear of their safety in light of the fact that Guerrero had punched her, prevented
9 her from calling the police, invited Leon over, and demanded that Brenda leave with him to
10 Mexico. Brenda cried during the sexual encounter. Because the Nevada Supreme Court’s
11 determination that there was overwhelming evidence that Brenda did not consent was
12 reasonable, its determination that Guerrero failed to demonstrate a reasonable probability that the
13 result of his trial would have been different if his trial counsel had requested the mistaken-belief-
14 of-consent jury instruction was also reasonable. Guerrero is denied federal habeas relief for
15 Grounds 11 and 15(5).

19 ²⁴¹ ECF No. 117 at 11.

20 ²⁴² See ECF No. 37-4 at 31 (Guerrero’s trial counsel’s closing argument comment “that there was
21 consensual contact between these two people” and that Brenda did not believe that she had been
sexually assaulted when she spoke to law enforcement).

22 ²⁴³ See ECF No. 37-7 at 34–35, 37; see also *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)
(explaining that jury instruction “‘may not be judged in artificial isolation,’ but must be
23 considered in the context of the instructions as a whole and the trial record” (quoting *Cupp v.*
Naughten, 414 U.S. 141, 147 (1973))).

²⁴⁴ *Strickland*, 466 U.S. at 694.

1 **5. Ground 15**

2 In the remainder of Ground 15,²⁴⁵ Guerrero argues that his trial counsel failed to object to
3 improper jury instructions and failed to join in on a proffered jury instruction offered by Leon.²⁴⁶
4 Ground 15(1) focuses on Jury Instruction No. 14, which lessened the State’s burden of proof to
5 “slight evidence” rather than “beyond a reasonable doubt” on proving the existence of a
6 conspiracy.²⁴⁷ In Ground 15(4), Guerrero argues that his trial counsel failed to object to the
7 improper jury instructions—37, 38, and 41—on attempted murder because they lessened the
8 State’s burden of proving that Guerrero had the express malice necessary to be found guilty of
9 attempted murder.²⁴⁸ And in Ground 15(6), Guerrero argues that his trial counsel failed to join
10 in on Leon’s motion to instruct the jury on voluntary intoxication.²⁴⁹

11 Guerrero takes issue with the “slight evidence” language contained in the first line of Jury
12 Instruction No. 14, which stated:

13 Whenever there is slight evidence that a conspiracy existed, and
14 that the defendant was one of the members of the conspiracy, then
15 the statements and the acts by any person likewise a member may
16 be considered by the jury as evidence in the case as to the
17 defendant found to have been a member, even though the
18 statements and acts may have occurred in the absence and without
19 the knowledge of the defendant, provided such statements and acts
20 were knowingly made and done during the continuance of such
21 conspiracy, and in furtherance of some object or purpose of the
22 conspiracy.²⁵⁰

19 ²⁴⁵ Portions of Ground 15 were discussed with Grounds 10 and 11.

20 ²⁴⁶ ECF No. 26 at 107. I previously dismissed Guerrero’s ineffective-assistance-of-appellate-
21 counsel claims and state-district-court-error claims that were also included with Ground 15. *See*
ECF No. 98 at 13.

22 ²⁴⁷ ECF No. 26 at 109.

²⁴⁸ *Id.* at 118.

23 ²⁴⁹ *Id.* at 122.

²⁵⁰ ECF No. 37-7 at 20.

1 The Nevada Supreme Court has held that, “[i]n determining the admissibility of [various co-
2 conspirator out-of-court declarations], the district court properly found the existence of a
3 conspiracy by ‘slight evidence’ as required in Nevada.”²⁵¹ Although it does not appear that it
4 was necessary to instruct the jury regarding the evidentiary threshold used to determine whether
5 a co-conspirator’s statements should be admitted, I do not conclude that Jury Instruction No. 14
6 was improper or confused the jury as to the State’s burden of proof. The jury was also instructed
7 that Guerrero “is presumed innocent until the contrary is proved” and “[t]his presumption places
8 upon the State the burden of proving beyond a reasonable doubt every material element of the
9 crime charged and that the Defendant is the person who committed the offense.”²⁵² It was also
10 instructed that “[t]o be guilty of conspiracy, a defendant must intend to commit, or to aid in the
11 commission of, the specific crime agreed to.”²⁵³

12 I now turn to Guerrero’s contention regarding the attempted-murder jury instructions—
13 37, 38, and 41. Jury Instruction No. 37 provided that “[a]ttempted murder is the performance of
14 an act or acts which tend, but fail, to kill a human being, when such acts are done with express
15 malice, namely, with the deliberate intention unlawfully to kill.”²⁵⁴ Jury Instruction No. 38
16 defined malice aforethought:

17 Malice aforethought, as used in the definition of Attempted
18 Murder, means the intentional attempt to kill another human being
19 without legal cause, legal excuse or what the law considers
20 adequate provocation. The condition of mind described as malice
aforethought may rise, not alone from anger, hatred, revenge or
from particular ill will, spite, or grudge toward the person killed,
but may result from any unjustifiable or unlawful motive or

21 ²⁵¹ *McDowell v. State*, 746 P.2d 149, 150 (Nev. 1987); *see also Peterson v. Sheriff, Clark*
22 *County*, 598 P.2d 623, 624 (Nev. 1979).

23 ²⁵² ECF No. 37-7 at 11.

²⁵³ *Id.* at 15.

²⁵⁴ *Id.* at 47.

1 purpose to injure another which proceeds from a heart fatally bent
2 on mischief or with reckless disregard of consequences and social
3 duty. Malice aforethought does not imply deliberation or the lapse
4 of any considerable time between the malicious intention, but
5 denotes rather an unlawful purpose and design in contradistinction
6 to accident and mischance.²⁵⁵

7 And Jury Instruction No. 41 provided that “[e]xpress malice is that deliberate intention
8 unlawfully to take away the life of a fellow creature, which is manifested by external
9 circumstances capable of proof. Malice may be implied when no considerable provocation
10 appears, or when all the circumstances of the killing show an abandoned and malignant heart.”²⁵⁶

11 Under Nevada law, “[a]ttempted murder is the performance of an act or acts which tend,
12 but fail, to kill a human being, when such acts are done with express malice, namely, with the
13 deliberate intention unlawfully to kill.”²⁵⁷ Jury Instruction No. 37 mirrors this language and,
14 thus, is a proper recitation of the intent required for attempted murder under Nevada law.²⁵⁸ The
15 Nevada Supreme Court has explained, however, that “[a]n instruction on implied malice in
16 relation to the crime of attempted murder is misleading to a jury.”²⁵⁹ So Jury Instruction No.
17 41’s inclusion of a definition of both express and implied malice was misleading.²⁶⁰ For this
18 reason, Guerrero’s trial counsel was deficient for not objecting to the misleading nature of Jury

19 ²⁵⁵ *Id.* at 48.

20 ²⁵⁶ *Id.* at 51.

21 ²⁵⁷ *Keys v. State*, 766 P.2d 270, 273 (Nev. 1988).

22 ²⁵⁸ *See* ECF No. 37-7 at 47.

23 ²⁵⁹ *Keys*, 766 P.2d at 272; *see also Sharma v. State*, 56 P.3d 868, 870 (Nev. 2002) (“[A]ttempted murder can only be committed with express malice. . . . [I]mplied malice alone is insufficient to support a conviction for attempted murder.”).

²⁶⁰ *See* ECF No. 37-7 at 51.

1 Instruction No. 41.²⁶¹ But Guerrero fails to demonstrate prejudice regarding this deficiency.²⁶²

2 The Nevada Supreme Court, the final arbiter of Nevada law, declined to reverse a conviction in
3 this situation “because, although the jury was improperly instructed on implied malice, it was
4 properly instructed regarding the elements of attempted murder.”²⁶³

5 Finally, I turn to the involuntary-intoxication jury instruction, which Leon proposed this
6 way:

7 No act committed by a person while in a state of voluntary
8 intoxication shall be deemed less criminal by reason of his
9 condition, but whenever the actual existence of any particular
10 purpose, motive or intent is a necessary element to constitute a
particular species or degree of crime, the fact of his intoxication
may be taken into consideration in determining such purpose,
motive or intent.²⁶⁴

11 Leon’s trial counsel argued that there was evidence that Leon was voluntarily intoxicated
12 because he asked Guerrero during cross-examination, “isn’t it true the night before, hours before
13 this all happened, you and [Leon] had been smoking marijuana, and [Guerrero’s] response was
14 yes.”²⁶⁵ After the State argued that too much time had elapsed between the alleged intoxication
15 and the incidents, Leon’s trial counsel argued, “[t]here has been no testimony offered by
16 anybody that the effects of the marijuana had worn off.”²⁶⁶ The state district court requested that
17 the relevant testimony be provided to him, and, thereafter, he denied the instruction, explaining
18 that “there’s no evidence that [Leon] was smoking or drinking.”²⁶⁷ The state district court

19 ²⁶¹ *Strickland*, 466 U.S. at 690.

20 ²⁶² *Id.* at 694.

21 ²⁶³ *Riebel v. State*, 790 P.2d 1004, 1006 (Nev. 1990).

22 ²⁶⁴ ECF No. 37-6 at 4.

23 ²⁶⁵ ECF No. 37-4 at 4.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 6–7.

1 further explained that “there’s no evidence to support” the voluntary-intoxication instruction
2 because “there is no evidence that [Leon] was intoxicated or even smoked marijuana, and the
3 evidence is that he hadn’t.”²⁶⁸ Indeed, the relevant testimony from Guerrero was that on the night
4 of November 5, 2001, Guerrero was “out smoking weed and drinking” and that “[Leon] was with
5 [him] for a moment, but then [he] dropped [Leon] off at his girlfriend’s house.”²⁶⁹ Later, at the
6 post-conviction evidentiary hearing, Guerrero’s trial counsel testified that he “just [did]n’t think
7 the facts were there” to support a voluntary intoxication jury instruction regarding Guerrero.²⁷⁰

8 Guerrero fails to demonstrate that his trial counsel was deficient in this regard.²⁷¹ While
9 Guerrero testified that he drank alcohol and smoked marijuana on the night of November 5,
10 2001, there was no evidence that he was still intoxicated when he arrived at the Gallardo
11 residence at approximately 9:00 a.m. on November 6, 2001. Therefore, the facts do not show
12 that a voluntary-intoxication instruction regarding Guerrero was warranted.

13 Because Guerrero has not shown that his trial counsel was deficient—or, in the instance
14 in which he did demonstrate deficiency, failed to demonstrate prejudice—the remainder of
15 Ground 15 is not substantial, so Guerrero has not shown that his post-conviction counsel was
16 ineffective. And because Guerrero’s post-conviction counsel was not ineffective, there is no
17 cause for Guerrero’s procedural default.²⁷² The remainder of Ground 15 is denied because it is
18 procedurally defaulted.

21 ²⁶⁸ *Id.* at 7.

22 ²⁶⁹ ECF No. 37-3 at 23.

23 ²⁷⁰ ECF No. 48-8 at 57.

²⁷¹ *Strickland*, 466 U.S. at 690.

²⁷² *See Martinez*, 566 U.S. at 9.

1 **6. Ground 20**

2 In Ground 20, Guerrero argues that his trial counsel failed to challenge Leon’s duress
3 theory of defense.²⁷³ Guerrero argues that Leon’s trial counsel brought up Leon’s duress defense
4 several times during the trial. First, Leon’s trial counsel asked Sonia questions about Leon’s size
5 compared to her size.²⁷⁴ Second, Leon’s trial counsel asked Brenda questions about whether
6 Leon was following Guerrero’s orders on the day of the incidents.²⁷⁵ Third, Leon’s trial counsel
7 asked Sergeant Cervantes about Leon’s age.²⁷⁶ Fourth, Leon’s trial counsel asked Guerrero
8 questions about whether he gave orders to Leon.²⁷⁷

9 Later, the state district court refused to give Leon’s requested jury instruction, “which
10 state[d] that a defendant is not guilty of a crime if the defendant participated in the crime under
11 duress.”²⁷⁸ The state district court explained that “the evidence was that [Leon] was a willing
12 participant, and when [Leon] was left alone with Sonia, that [Guerrero] was nowhere around
13 when [Leon] shot her in the face according to the evidence and testimony.”²⁷⁹ The state district
14 court then went on to explain that “[t]here [was] not one iota of evidence to suggest that [Leon]
15 was operating under duress or anything such as that; so, there’s no fact in evidence that would
16 support giving” the duress defense instruction.²⁸⁰

17
18
19 ²⁷³ ECF No. 26 at 147.

20 ²⁷⁴ ECF No. 36-10 at 17.

21 ²⁷⁵ ECF No. 37-2 at 45–46.

22 ²⁷⁶ *Id.* at 59.

23 ²⁷⁷ ECF No. 37-3 at 24, 30.

²⁷⁸ ECF No. 37-4 at 2.

²⁷⁹ *Id.* at 3.

²⁸⁰ *Id.*

1 Although Leon’s trial counsel elicited some testimony that Leon was following
2 Guerrero’s orders on the day of the incidents, was small in stature, and was young, those facts do
3 not support a conclusion that Leon acted under duress. Indeed, the state district court prohibited
4 Leon from presenting a duress jury instruction because the facts failed to support that theory of
5 defense. Accordingly, even if Leon’s trial counsel was attempting to present a duress theory of
6 defense, he failed to do so, and Guerrero’s trial counsel was not deficient for failing to challenge
7 it.²⁸¹

8 Guerrero also argues in Ground 20 that his trial counsel failed to investigate allegations
9 that Leon was a gang member.²⁸² Guerrero’s trial counsel testified at the post-conviction
10 evidentiary hearing that he was never made aware of Leon’s alleged gang affiliation.²⁸³
11 However, even if he had known about Leon’s alleged gang affiliation, Guerrero’s trial counsel
12 testified that he “definitely wasn’t going to bring it up at trial” because, based on his experience,
13 he would not want to associate Guerrero with a gang member.²⁸⁴ Because Guerrero never
14 informed his trial counsel about Leon’s alleged gang affiliation and because Guerrero’s trial
15 counsel had strategic reasons for not bringing it up had he known about it, Guerrero fails to
16 demonstrate that his trial counsel was deficient.²⁸⁵

17 Because Guerrero has not shown that his trial counsel was deficient, Ground 20 is not
18 substantial, so Guerrero has not shown that his post-conviction counsel was ineffective. And
19

20 ²⁸¹ *Strickland*, 466 U.S. at 690.

21 ²⁸² ECF No. 26 at 147.

22 ²⁸³ ECF No. 48-8 at 22, 32.

23 ²⁸⁴ *Id.* at 32–33.

²⁸⁵ *Strickland*, 466 U.S. at 690; *see also Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998) (“[C]ounsel is not deficient for failing to find mitigating evidence if . . . nothing has put the counsel on notice of the existence of that evidence.”).

1 because Guerrero's post-conviction counsel was not ineffective, there is no cause for Guerrero's
2 procedural default.²⁸⁶ Ground 20 is denied because it is procedurally defaulted.

3 **C. Certificate of Appealability**

4 The right to appeal from the district court's denial of a federal habeas petition requires a
5 certificate of appealability. To obtain that certificate, the petitioner must make a "substantial
6 showing of the denial of a constitutional right."²⁸⁷ "Where a district court has rejected the
7 constitutional claims on the merits," that showing "is straightforward: The petitioner must
8 demonstrate that reasonable jurists would find the district court's assessment of the constitutional
9 claims debatable or wrong."²⁸⁸ Because I have rejected petitioner's constitutional claims on their
10 merits, and he has not shown that this assessment of his claims is debatable or wrong, I find that
11 a certificate of appealability is unwarranted in this case.

12 **Conclusion**

13 IT IS THEREFORE ORDERED that the second amended petition [ECF No. 26] is
14 **DENIED**, and because reasonable jurists would not find my decision to deny this petition to be
15 debatable or wrong, IT IS FURTHER ORDERED that **a certificate of appealability is**
16 **DENIED**.

17 And, because Guerrero is represented by counsel, the respondents' motion to strike
18 Guerrero's pro se request for judicial notice [ECF No. 120] is **GRANTED**. ECF No. 119 is
19 **hereby STRUCK**.

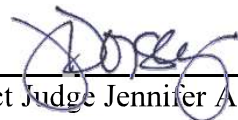
20
21
22 ²⁸⁶ See *Martinez*, 566 U.S. at 9.

23 ²⁸⁷ 28 U.S.C. § 2253(c).

²⁸⁸ *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *James v. Giles*, 221 F.3d 1074, 1077–79 (9th Cir. 2000).

1 The Clerk of Court is directed to ENTER JUDGMENT accordingly and CLOSE THIS
2 CASE.

3 Dated: April 9, 2020

4 
U.S. District Judge Jennifer A. Dorsey